ATTACHMENT 1

XSPEDIUS Communications

XSPEDIUS COMMUNICATIONS SERVICES AGREEMENT
General Terms and Conditions

This Services Agreement ("Agreement") is between Xspedius Communications, LLC on behalf of its applicable service providing entity ("Xspedius") and the individual or entity identified as the customer (hereinafter referred to as "Customer") on the [illegible]

1. SERVICES. Xspedius will provide the Services referenced above in accordance with the terms of this Agreement and of Xspedius' applicable tariffs.
2. OBLIGATIONS OF CUSTOMER. [illegible]
3. TERM COMMITMENT. [illegible]
4. FEES and CHARGES. [illegible]
5. PAYMENT. [illegible]
6. INTERRUPTION OF SERVICE CREDIT. [illegible]
7. TERMINATION BY XSPEDIUS. [illegible]
8. TERMINATION BY EITHER PARTY. [illegible]
9. EARLY TERMINATION CHARGES. [illegible]
10. BILL DISPUTES. [illegible]
11. RESOLUTION OF DISPUTES. [illegible]
12. USE OF SERVICES. [illegible]
13. UPGRADES AND DOWNGRADES. [illegible]
14. XSPEDIUS-OWNED CUSTOMER PREMISE EQUIPMENT. [illegible]
15. LIMITATION OF LIABILITY. [illegible]
16. LIABILITY OF CUSTOMER. [illegible]
17. WARRANTIES. XSPEDIUS DOES NOT WARRANT UNINTERRUPTED OPERATION OF THE SERVICES AND SPECIFICALLY DISCLAIMS ANY OTHER WARRANTIES NOT MADE IN THIS AGREEMENT, EITHER EXPRESSED OR IMPLIED, INCLUDING THE WARRANTIES OF TITLE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
18. LETTER OF AUTHORIZATION. [illegible]
19. DEPOSIT. [illegible]
20. TRANSFER AND ASSIGNMENT. [illegible]
21. FORCE MAJEURE. [illegible]
22. INSTALLATION REQUESTED INFORMATION. [illegible]
23. PRESS RELEASE, ANNOUNCEMENTS AND TRADEMARKS. [illegible]
24. NOTICES. [illegible]
25. GOVERNING LAW. [illegible]
26. ENTIRE AGREEMENT. [illegible]
27. ADDITION/MODIFICATION. [illegible]
28. SEVERABILITY. [illegible]

X______________________________
Customer Initial

XSP 000004

XSPEDIUS Communications

Terms and Conditions:
Internet ConneXions/ Data ConneXions/ Metro ConneXions

In addition to the General Terms and Conditions set forth on the back of the Service Agreement by and between Customer and Xspedius, Customer hereby agrees and understands that the following terms and conditions shall also apply when Customer uses any of Xspedius' Internet Services, including Internet ConneXions, Data ConneXions, and Metro ConneXions suites of products.

Xspedius' Responsibilities:

Access Circuit – Xspedius will provision a telecommunications circuit for Internet Access Service, from the demarcation point[1] to Xspedius' nearest or approved Point of Presence (POP). Circuits are provisioned from Xspedius or from third-party local exchange carriers and are based on availability. Xspedius will order the circuit to be terminated at the demarcation point at Customer's site unless Customer instructs Xspedius otherwise. Customer will be responsible for any fees charged by the local exchange carrier for the extension of the circuit to another location.

IP Address Allocation and Support – Xspedius will allocate address space to Customer for the duration of this Agreement. Under ARIN recommendations, Xspedius will not permit portability of Xspedius IP address space. Xspedius will route IP address networks obtained directly from ARIN; however, Xspedius will not route IP address networks that Customer were assigned from another ISP, except when Customer is dually homed between that particular ISP and Xspedius. Xspedius will not provide reverse resolution for more than five /24 IP addresses issued to Customer by ARIN, or for any IP addresses owned by another ISP. Xspedius will not provide private IP address subnets as set aside by the Internet Engineering Task Force (www.ietf.org).

Primary and Secondary DNS Support: Xspedius will only provide Primary or Secondary DNS to those customers that have a contractual agreement with Xspedius for such Services. Xspedius will not provide Primary or Secondary DNS for ISPs, web hosting providers, or other telecommunications providers.

Service Activation – Internet Access Service Implementation will be complete and billing will begin when any of the following applicable criteria have been met:

- Any Xspedius supplied CPE is installed and operational
- IP connectivity to the Internet (including routing outside Xspedius' network exists)
- Xspedius Network Operations verifies IP routing through a trace-route test, via the CPE router
- If Xspedius registers a domain on Customer's behalf, Customer's domain is registered with Internic
- Xspedius supplied Primary and/or Secondary DNS are operational for Customer's domain
- Any required packet filtering has been installed in the CPE router
- Any Xspedius supplied accounts is established

Billing will not be delayed if, for any reason, any act or omission by Customer causes a delay in the provision of services.

Management and Monitoring – Xspedius will be responsible for the on-going management and troubleshooting of all components up to the demarcation point 24 hours a day, 7 days a week. Xspedius shall be responsible for all configuration, management, and troubleshooting up to the demarcation point. Customer shall be responsible, and shall hold Xspedius harmless from, any defect, failure or problem arising from beyond the demarcation point, including all equipment, cabling, software, configuration, and management.

Newsfeed Service – Xspedius offers full newsfeeds only. Customer's customers are not allowed to direct their connections to Xspedius' servers for news service. Customer will not have the ability to restrict specific newsgroups or hierarchies from being fed to Customer's server.

Packet Filtering – Performance measurements or specifications under this Agreement do not apply to packet filtering, which are not guaranteed.

[1] *The demarcation point for these Services is the established main demarcation point for the telecommunications access circuit at Customer's site. Extended demarcation to another location at Customer's site may be available at an additional charge which Customer must pay in advance.*

Customer's Responsibilities:

Customer provided Information: In order to appropriately activate and maintain Customer's service, Customer must provide Xspedius with the following information in a timely manner: Customer on or off-site contacts (including modem, fax and off-hours contacts), and all technical information reasonably required by Xspedius to perform Xspedius' responsibilities.

Security: Customer must make any and all provisions for establishing proper security for Customer's Internet or data access service.

Management and Monitoring: Customer is responsible for managing the equipment located on the LAN side of the router ("LAN Environment"). If Xspedius isolates a problem beyond the demarcation point, as defined above, Customer shall be solely responsible for fault resolution and completion. Customer shall have no remedy or claim for service outages or degradations resulting from any actions beyond the demarcation point. If Customer supplies its own CSQ, Customer shall ensure that its equipment meets Xspedius' hardware and software configuration guidelines. Customer shall be responsible for configuration, monitoring, and maintenance of all CPE and CSQ after initial installation. Xspedius shall provide initial configuration of CPE or CSQ purchased from Xspedius, however, Customer shall remain responsible for ongoing configuration monitoring, and maintenance, unless router maintenance services are set out in Customer's Service Order Form. Customer agrees to hold Xspedius harmless from any and all damages, claims, or liability immediately upon the effective date of the termination or other transfer of the CPE or CSQ to Customer.

IP Address: Xspedius shall allocate address space during the installation process. It is required that documented justification be submitted to Xspedius prior to the allocation of address space. The number of IP addresses allowed will be based on ARIN guidelines and will have no impact on Customer's agreement to accept Service. If Customer requires larger blocks of address space, Customer must petition ARIN directly. Upon termination Customer shall be required to [illegible] any allocated address space to Xspedius, and provide Xspedius with authorization to release Customer's address space.

Network Performance Measurements:
Xspedius endeavors to maintain the following network service measurements:

	Internet	Frame	ATM
Availability[1]	99.999%	99.999%	99.999%
Median round-trip latency[2]	60 milliseconds	100 milliseconds	100 milliseconds
packet loss[3]	0.3%		
Delivery Rate		99.9% CIR 99% non-CIR[4]	99.9% SCR 99% non-SCR[4]

[1] Internet Availability is defined as the ability for Xspedius' customers to exchange traffic from their network, across Xspedius' network to Xspedius' Internet peering points. Frame and ATM availability only covers IntraLata Services and includes on-net ports and PVCs. Internet, Frame and ATM availability are all measured from the point of egress on Xspedius' network. Availability of access through the CPE is not guaranteed unless Xspedius provides Managed Router or Managed Firewall service, in which case availability of access through the CPE is guaranteed under the terms of the Managed Router or Managed Firewall service. Availability of access through the local loop to Xspedius' network is not guaranteed, unless Xspedius provides the local loop entirely on Xspedius' own facilities.

[2] Median round-trip latency – Xspedius uses "median" rather than "mean" (average) because it provides a more accurate network performance parameter that is not affected by performance anomalies. The median number will be determined by evaluating samples taken throughout the calendar month.

[3] Average packet loss will be calculated by evaluating samples taken from tests run between Xspedius' network core hubs over the course of a calendar month.

[4] Not applicable to 1) PVCs with CIR/ SCR less than 25% of port speed or 2) port oversubscribed by more than 200%

Outage Credits

Customer will be eligible to receive a credit for any outage that Customer experiences due to unavailability of the Service or when the Customer experiences more than 20% packet loss within Xspedius' network. In order to receive an outage credit Customer must open a trouble ticket with Customer Care. Credits will be given based upon the outage time recorded in the applicable trouble ticket. Customer will be eligible for a credit on Customer's invoice based upon the following schedule: If the outage is greater than 30 minutes, but less than 4 hours, Customer will be eligible for a credit equal to the value of one days' Service; if the outage is for greater than 4 hours in duration, Customer will be eligible for a credit equal to the value of two days' Service. The maximum credit available in any calendar month is 50% of the monthly recurring charges for the affected Service. Customer will not receive outage credits attributable to 1) planned, scheduled or routine maintenance; 2) any Customer-owned or -ordered telephone company circuits; 3) Customer's local loops; 4) a fault in Customer's applications, equipment, or facilities; 5) acts or omissions of Customer, or any user of the service authorized by Customer; 6) events of Force Majeure (as defined in the General Terms and Conditions of the Service Agreement); or 7) any Internet access or related problems beyond the demarcation point of Xspedius' Internet peering points. This shall be Customer's sole and exclusive remedy and Xspedius' sole obligation with regard to any outage unless otherwise expressly noted in the Agreement.

Requesting a Credit: To receive a credit, Customer must contact Xspedius' Customer Care Center within five (5) days of the outage, and provide the Customer Care representative with the following information:

1). Customer's company name;
2). Sufficient information which will allow Xspedius to contact Customer;
3). The date(s) and duration(s) of event(s); and
4). The Xspedius trouble ticket numbers Customer has been given by Xspedius Customer Care that were associated with the outage.

Upon Xspedius' sole determination that an outage took place, Customer will receive the appropriate Outage Credit.

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ATTACHMENT 2

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LIMITATION OF LIABILITY FOR INTERRUPTION OF SERVICE FOR REGULATED TELEPHONE COMPANIES: AN OUTMODED PROTECTION?

NAME: Rendi L. Mann-Stadt

SUMMARY:
... Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. ... Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted. ... Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions. ... Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. ... Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. ... Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. ... Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. ... An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. ...

TEXT:
[*629]
Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. This protection evolved along with the strict oversight and regulation that characterized the predivestiture telecommunications industry. In exchange for the required universal service obligation, state utility commissions limited recovery of damages against the utility, partially as a method of keeping telephone rates reasonable. As the modern telecommunications industry undergoes regulatory reform, however, the historic basis for limitation of liability may no longer exist. The author of this note explores the historical underpinnings of limitation of liability in telephone regulation and discusses public policy considerations for the protection. Next, the author examines the justification for limitation of liability in the context of the new forms of utility regulation. Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted.

I. Introduction

In 1988, a fire destroyed the telephone switching station in the Chicago suburb of Hinsdale, Illinois. n1 The fire completely devastated the communications facility, which had routinely routed and directed up to 3.5 million calls daily. n2 After the fire, the damage completely suspended telephone service to and from the western and southwestern suburbs of Chicago, and for approximately one month after the disaster, the residences and businesses in the affected area still had disrupted service. n3

As a result of the outage, businesses in this high-tech corridor sustained enormous financial losses estimated beyond ten million dollars. n4 Alleging negligence and seeking economic damages, numerous customers filed a class action suit against Illinois Bell Telephone Company. n5 In seeking a dismissal of the claim, Illinois Bell cited exculpatory language [*630] in its tariff filed with the Illinois Commerce Commission. n6 Relying in large part upon this limitation of liability in the tariff, the trial court granted Illinois Bell's motion for summary judgment and the appellate court affirmed. n7 The Illinois Supreme Court, however, reversed and remanded, holding that the facts as pleaded presented a valid cause of action based on another section of Illinois law. n8

Similar exculpatory language in tariffs in many other jurisdictions has been interpreted to extend protection from outage-related claims to utilities in general, and telephone companies in particular. n9 Thus, in most jurisdictions, even if a telephone company's conduct is negligent, regardless of the extent of the damage, it can completely avoid liability. The limitation of liability tariff language and the protection it extends to the respective utility is an outgrowth of the structure of utility regulation, and is frequently justified as compensation for the "rigors" of regulation. n10

Most states have statutory provisions that burden local operating telephone companies with strict oversight and require telephone companies to provide universal service within their franchise area. n11 In ex [*631] change, many states also regulate utility liability, limiting recovery of damages against utilities and thereby avoiding the imputation of such costs into customer rates. n12 But strict telephone regulation, which represents the burden that limitation of liability serves to alleviate, is shifting. Both competition and deregulation now characterize segments of the industry, and many state utility commissions have approved regulatory schemes with more flexible pricing and regulation. n13 Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions.

This note examines whether the limitation of liability is still appropriate for local operating telephone companies within the current regulatory framework. Part II explores the origins of the limitation of liability doctrine in telephone regulation and provides an overview of the nature of current limitation of liability provisions. n14 Part II also discusses the public policy considerations and legal doctrines utility commissions and courts use to justify limited liability in the telephone company context. n15 Part III analyzes the limitation policy in light of the present structure and status of telephone regulation. n16 Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. n17 Part V concludes that even in light of shifting trends in regulatory oversight, limitation of liability tariff provisions are still conscionable and necessary so long as protection is not extended to cases of wilful or wanton misconduct by a utility. n18

II. Background: Historical Origins of Telephone Regulation and the Limitation of Liability

Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. n19 These provisions evolved as a compo [*632] nent of the regulatory structure of telephony. n20 This section traces the evolution of telephone regulation, the genesis of the limitation of liability concept, and the weight the judiciary has afforded such clauses.

A. Telephone Regulation

In 1910, Congress delegated responsibility for telephone and telegraph regulation to the Interstate Commerce Commission. n21 In 1934, Congress established the Federal Communications Commission which assumed responsibility for telephone regulation. n22 Currently, interstate telephone operations remain under the jurisdiction of the Federal Communications Commission, n23 while regulatory commissions in each state oversee the intrastate operations of telephone companies. n24 States typically classify corporations which provide telephone service as regulated monopolies, subject to governmental agency oversight of operations and rate making. n25

Most state legislatures have enacted public utility statutes which create and authorize state utility commissions to regulate the intrastate operations of the natural telephone monopoly. n26 As a regulated utility, a telephone company is obligated to serve all customers in the franchise area, under the same terms and conditions, and under rates approved by [*633] the regulatory commission. n27 Historically, state regulatory agencies emphasized the public policy of universal service, n28 and used rate of return regulation n29 with a subsidized pricing structure to ensure economical residential service. n30

The underlying goal of universal service was the provision of optimum penetration of service at reasonable rates. n31 In 1982, however, government antitrust litigation against AT&T resulted in the divesture of that company and the formation of the "Baby Bells." n32 The settlement of the AT&T antitrust suit, the Modified Final Judgment, n33 not only changed the structure of telecommunications, but also created a shift in the power of regulatory oversight of the local exchange companies from the federal arena to the state level. n34 Since the divestiture of AT&T in 1984, n35 state utility commissions have followed the national procompetition movement and have approved a variety of regulatory reforms. n36 Regulatory commissions still maintain the role of overseer of the tele [*634] phone companies. Strict rate of return regulation, however, has ceded in many jurisdictions to alternative paradigms of regulatory oversight including price cap, n37 incentive, n38 or rate stabilization regulation. n39

Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. For purposes of evaluating limitation of liability, the important characteristics of this transformation are lessened regulatory constraints, an increased ability for telephone companies to retain revenues, and a restricted ability to raise rates. n40 These characteristics generally indicate a lessening of the burden of regulation on local telephone companies. n41

While state utility commissions have not addressed limitation of liability as a facet of any of these new regulatory plans, several states have imposed quality of service standards as a component of more flexible regulation. n42 Other quality oversight measures have been precipitated by [*635] large outages. n43 For example, in reaction to the Hinsdale fire, n44 the Illinois Commerce Commission enacted a rule requiring certain maintenance and disaster response procedures. n45

Another pertinent and interesting outgrowth of the increase in telecommunications competition is that many local telephone companies have explored alternative routing (called route diversity) to enhance reliability and avoid paralyzing outages resulting from a single facility loss. n46 While not directly mandated by the regulatory body, this technological enhancement reduces the risk of outage. To meet their nonregulated competitors' offerings, many local telephone companies may offer customers who rely heavily on telecommunications the option of paying for specific route "insurance." n47

Quality of service standards and service enhancements may ease the amount of litigation regarding limitation of liability clauses. Despite these efforts, however, courts do not analyze companies' efforts to reduce risk of outage, but merely apply the blanket limitation of liability. n48 This limitation, developed as compensation for the more traditional regulatory environment, n49 remains virtually unchanged n50 despite the altered regulatory approaches.

B. Limitation of Liability Clauses

1. Tariffs as Force of Law: Source of Limitation of Liability Clauses

Despite the procompetition movement in telephone regulation, traditional tariff filing requirements still prevail in most jurisdictions. n51 [*636] Most states have statutes which require local exchange telephone companies to file comprehensive schedules of rates, rules, classifications, and regulations with the administrative agency charged with public utility oversight. n52 Provisions dictated by these jurisdictional statutes and tariffs curtail and govern the rights and privileges that a utility might seek if it were an unregulated corporation entering into ordinary contractual relationships with customers in the open marketplace. n53

A telephone company's official tariff binds both the company and its subscribers. n54 Most courts recognize the delegation of authority by the legislature to the utility commission, and hold that the tariff exclusively dictates the extent of the utility's duty to its customers. n55 Therefore, when a limitation of liability rule is properly approved by the jurisdictional regulatory body, most courts hold that liability provisions, if reasonable, operate to limit the telephone company's liability. n56

2. Traditional Support for Limitation of Liability Provisions

Inclusion of tariff provisions limiting telephone company liability evolved from doctrines established in telegraph law. n57 In Primrose v. [*637] Western Union Telegraph Co., n58 a seminal case in telegraph regulation, the U.S. Supreme Court distinguished between telegraph companies' duties and those of other common carriers. n59 The Court stated that although telegraph companies have a clear duty to the public, they are not completely analogous to common carriers because message carriers move something with no recognizable intrinsic value to the carrier. n60 The Court went on to say that because message carriers cannot foresee the value of the cargo, telegraph companies are not subject to the same liabilities as other common carriers. n61 Thus, the Court concluded that because telegraph companies are unaware of the value a message might have, and are unable to take commensurate precautions for highly valued transmissions, the message carrier cannot be expected to assume a potentially unlimited liability for a subscriber's valuable message in unforeseeable circumstances. n62

Historically, many jurisdictions recognized the quid pro quo of limited liability as a component of the burdens and constrictions of telephone regulation. n63 For example, in Correll v. Ohio Bell Co., n64 an Ohio appellate court noted:

A public utility is, by law, regulated strictly in its operation. Rights and privileges which it might seek under ordinary contractual relations are curtailed by provisions of the statutes. Its liabilities are likewise regulated and limited by provisions of the statutes. The theory is that, since it renders service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control, its liability is and should be defined and limited. In a sense it is a matter of contract, on the one hand by the utility and on the other by the state representing all of its citizens. n65

Courts in most states consistently find that limitation of liability rules are constitutional and legal when applied to cases of telephone outages or errors involving negligence. n66 Where such forbearance is a com [*638] ponent of the tariff appropriately filed and is approved by the appropriate utilities commission, most courts have held that this tariff clause is binding. n67 The substantial deference most courts give to an agency's approval of a limitation of liability clause is often based on the premise that the tariff defines the legal duty of the utility and that no other contractual basis exists for a cause of action. n68

3. Types of Limitation of Liability Clauses

Although most courts generally uphold utility commission approved limitation of liability tariff provisions, the language and character of these clauses varies among jurisdictions. n69 A majority of states limit telephone company liability for service interruptions to a rebate of the service charges during the outage period. n70 Some jurisdictions make distinctions based on the level of negligence, or intent, upholding the limitation only if the plaintiff fails to prove gross negligence, or wilful or wanton behavior. n71 Other jurisdictions distinguish the type of suit to be brought, sustaining immunity for claims alleging contractual breach, but waiving the limitation for actions brought using tort theories. n72 Generally, limitation of liability does not apply to situations involving illegality, or fraudulent, wilful, or wanton misconduct. n73 For example, the Califor [*639] nia Public Utilities Commission promulgated a rule requiring tariffs to inform customers that the limitation of liability rules do not apply to situations involving wilful misconduct, fraudulent conduct, or violations of the law. n74

Thus, historically, state utility commissions approve limitation of liability clauses for telephone companies, and courts sustain their validity. n75 An evaluation of their continued applicability must, however, progress beyond the statement of prevalence and analyze the motives underlying these limitations. The following section surveys the policy justifications for limitation of liability provisions.

4. Justifying Limitation of Liability for Regulated Utilities

The willingness of most courts to uphold limitation of liability provisions depends on a variety of public policy considerations regarding the particular character and responsibilities of regulated telephone companies. n76 Primarily courts view the limitation as a key element of the regulatory process, in particular as necessary compensation for the economic burden imposed by the universal service requirement and the strictures of regulation, n77 and as a vital limiting component of the rate-making process. n78 Some courts also cite the unique vulnerability telephone companies have because of their intense reliance on technology, n79 and acknowledge the inability to foresee damages related to the transmission of messages that are unknown as to content and value. n80 This section considers those theories associated with regulation and rate making that have been used to justify limitation of liability. [*640]

A. Limited Liability as Compensation for Strict Regulation

The basic theory supporting exculpatory clauses for damages arising from service interruptions is that "a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities." n81 The limitation of liability is seen, to some extent, as necessary to an equitable balance between the benefits and burdens of regulation. n82 Underlying this premise is the principle that property devoted to public use, or a use in which the public has an interest, grants to the public an interest in the use, which can be controlled by the public for the common good. n83

The appropriate regulatory body effectuates this control, and is charged with the duty to ensure that utilities render both reasonable and adequate service. n84 Thus, the telephone company is in a class of corporations strictly limited in its rights and privileges. Therefore, some argue it must be regulated, at least to the extent of its static known exposure to liabilities arising from its duty to serve its customers. n85

A telephone company cannot be selective about its customers; it is required to offer universal service without weighing the cost against the benefit of serving a particular customer. n86 A California appellate court, discussing this theory in the context of limited liability for errors in directory listings, held that because the state regulates and controls the telephone company, the utility's liabilities should be defined and limited. n87

A variation of the burden/benefit theory characterizes the limitation clause as not solely a limit on damage claims, but rather a limitation and definition of the duty of the telephone company to provide service. n88 Ac [*641] cording to this theory, the limitation clause sets out what type of service the utility will supply and the scope of the service it is required to furnish. n89 In this context, a telephone company is charged with the duty of providing service upon application, but in exchange for such responsibility, the corporation will not be required to provide completely uninterrupted or perfect quality service. n90

B. Limited Liability as a Rate Component

Most frequently, courts refer to the interrelationship between potential liability and rate structure as justification for limitation of liability for utilities. n91 The U.S. Supreme Court, in Western Union v. Esteve Bros. & Co., n92 limited a telegraph company's damage liability for an unreceived message. n93 Justice Brandeis, writing for the majority, stated, "the limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service ...." n94 Similarly, in Southwestern Sugar Co. v. River Terminals Corp., n95 the Supreme Court, in discussing common carrier obligations, noted, "the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the ... carrier of the expense of insuring itself against liability for damage ... and it is a reasonable rate so computed." n96

The goals of uniformity and equality are additional principles of telephone regulation and rate making that implicate limitation of liability. n97 The Court in Esteve Bros. n98 emphasized the uniform nondiscriminatory application of utility rates, and held that uniformity demanded that the rate as set in the tariff be the sole legal indicator of the company's liability and duty. n99 The Esteve Bros. Court further indicated that to allow some customers to recover for damages related to interrupted service provides a higher standard of service to those customers, and in effect, [*642] provides unequal treatment to a particular class of customers. n100

When validating company exculpatory clauses, state courts generally defer to utility commissions' powers created either under the state constitution or by the state legislature. n101 According to the Georgia Court of Appeals, the power to legislate rates and to determine what limitations of liability are necessary to establish the rates rests exclusively with the appropriate commission. n102 Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. n103 Thus, the court could not entertain suits for damages as a result of telephone service outages without thwarting the policy of economical telephone rates. n104

Another basis for limitation of liability that is a function of the rate-making rationale is the principle of risk compensation. n105 Many courts recognize that regulating agencies set a utility's rates commensurate with the risk assumed, n106 and reasonable rates are dependent in part upon upholding the limitation of liability rule. n107 Unlike a corporation competing in the open marketplace, the structure of utility regulation does not allow telephone companies to select a particular population to serve by assessing the risks associated with providing service to a specific location or customer. n108 Instead, telephone companies have a duty to serve all [*643] customers within their franchise area. n109 When courts uphold limitation of liability for common carriers or utilities, they often focus on the ultimate economic impact on the average ratepayer. n110

Broadened liability exposure inevitably raises costs, and thereby the rates of service. n111 For example, in a case where a business owner sought damages for losses resulting from a burglary, alleging a telephone company employee negligently tagged the lines connected to the alarm system, a Louisiana court of appeals held that if unlimited liability is placed upon public utilities for every service they provide, the general public as a whole would bear the burden. n112 Because state legislatures charge utility commissions with the duty of setting reasonable rates, commissions have the discretion to design regulations to minimize risks and costs which would be reflected in rates. n113 For example, if telephone company liability was extended for all subscribers suffering any measure of pecuniary loss, the burden of this cost, through rate of return regulation, would ultimately be shifted to each ratepayer. n114 This basis for restricting recovery against telephone companies is deeply ingrained in the notion that recovery for a few customer losses unjustly burdens all ratepayers.

This section considered the theories upon which courts rely to limit the ability of subscribers to recover damages from telephone companies and the relation of those theories to public policy and the regulatory process. n115 In the context of the technological burst of the last twenty years n116 and the accelerating move to deregulation in telecommunications, n117 however, the foundation and rationale for this limitation requires closer scrutiny. n118 The following section examines the appropriateness of continuing to limit liability as the form of telephone regulation shifts. n119 [*644]

III. Analysis

A. Present Day Justification: Is It Ceteris Paribus? n120

Two significant factors have had a profound impact on American telecommunications in the last ten years. First, sensational technological advancements in the industry have dramatically increased both competition and customer participation, and created an explosion of new products and capabilities. n121 Second, the watershed divestiture of AT&T in 1984 marked a dramatic change in telephone regulation. n122 The breakup of AT&T, n123 the formation of the "Baby Bells," n124 and the structural separations of the Modified Final Judgment, n125 created a transformation in the methodology of telephone regulation. n126 In light of these very critical changes, previous justifications for telephone company protection from liability merit review.

1. Do the Benefit and Burden Still Balance?

As indicated in part II, n127 one of the cornerstones of the justification for limitation of liability is the balance between the burdens and benefits of regulation. n128 In the current environment, however, many state regulatory commissions are allowing telephone companies greater flexibility in service provision and earnings, n129 and the lessened burden may no longer justify such a strict limitation of liability.

a. The Degree of Regulatory Stricture

The public policy rationale for limiting liability is often described as compensation for the encumbrances of restrictive regulation. n130 Judicial justification for endorsing limitation of liability focuses on the "imposition" of regulation upon the utility. n131 In fact, this scenario of a utility company as victim is questionable if one adopts the theory of some com [*645] mentators who suggest that regulation of the telecommunications industry was a desirable arrangement engineered by the Bell system to protect market dominance. n132 In fact, faced with ruthless competition in the early 1900s, AT&T viewed regulation as a protective milieu where monopolistic advantages could thrive. n133 This affirmative participation in self-regulation makes questionable the protectionist underpinnings of the balancing theory of limitation of liability.

Public policy theorists also point to the ability of regulated entities to influence the very administrative agencies charged with their oversight. n134 On the other hand, the history of telecommunications regulation is often cited as an exception to the "self-interest" theory of regulation where the telephone companies, particularly in recent years, have been unable to influence the regulatory agency to the extent of placing the regulators in the role of "cartel manager." n135 Perhaps a middle ground between the self-interest regulation theory and the passive disciplinary view of the restrictions of regulation is more realistic. Even such a moderate view, when interposed with a shift in the extent of actual regulation, makes questionable the degree of protection against liability warranted by telephone companies.

b. Risk Assumption Revisited

One element of the balancing of burden rationale is risk assumption. n136 Historically, utility commissions restricted telephone company rates and earnings levels while protecting the utility from competitive risk. n137 Modern state regulatory schemes, however, are premised upon a new contract of regulation. This new contract often allows a utility to earn and retain a higher rate of return in exchange for less protection from competition. n138 If an important component of the new regulatory frameworks is to "free" the local telephone companies to participate in the competitive marketplace, n139 should they still enjoy the guaranteed protection against liability arising from service disruption?

The essential question is still one of balancing benefits and burdens - weighing the appropriate risk with the appropriate return. It is [*646] possible that the risk appropriately correlated with the permission to retain more of the generated revenue is found in other areas such as lack of guaranteed rate increases, lack of ability to unilaterally change the price of its services, or competitors not saddled with regulated portions of the business. n140 If the risk and revenue levels are altered, however, sound public policy requires a re-examination of the appropriate degree of protection.

2. Is Rate Protection Still Necessary?

The dominant argument in favor of limitation of liability is the economic impact of insuring a few customers at the expense of all. n141 The major motivation for allowing limitation of liability in rate of return regulation is the fear that all costs create upward pressure on rates and ultimately increase prices. n142 In many jurisdictions, however, the modern state regulatory structure does not support this premise. An example of a new regulatory scheme that maintains rate protection is California where the two largest telephone companies have the ability to retain some measure of earnings at a higher rate of return with certain restrictions. n143 One of these restrictions is that local service rates are placed in a category of services that still require utility commission approval for any increases. n144 Another example is Illinois where in late 1992 Illinois Bell proposed a new method of regulation n145 that included a three year freeze on local rates. n146 These examples illustrate that if increased liability were imposed, upward pressure on rates might not affect the average ratepayer directly, or would at least be measurably delayed. n147

Because of the changes in regulatory structure, the basis for upholding strict limitation of liability provisions is less convincing. For many companies the threshold of allowed return has risen, n148 suggesting a company should be required to accept commensurate risk, possibly in the [*647] form of an expanded duty to customers. Other policy considerations and legal principles, however, suggest that some measure of limitation, even in the current regulatory environment, n149 is still valid.

3. Tort Principles: Argument Against Expanding Liability

Although the new forms of state telephone regulation suggest the need to curtail the limitation of liability, the relative capacity of the telephone companies and their customers to bear loss requires a moderate approach to any alteration of the limitation of liability. n150 The relative capacity is not so much a matter of the relative wealth of the parties, but a matter of the relative ability of the parties to avoid the loss, absorb it, or distribute it among a larger group. n151

At first glance, an obvious parallel to the situation of utilities and their consumers is that of a product manufacturer and its customers. In products liability, the extension of liability to the ultimate consumer is aided by the feeling that the manufacturer is best able to bear and distribute the loss. n152 However, the nature of the output is a significant difference between a manufacturer's product liability and the enormous liability that would be imposed on a telephone company. n153 When a manufacturer offers a product for sale, the customer can determine whether the price - which theoretically includes a premium to cover potential product liability damages - is worth the utility of the product. The customer can decide to forego the purchase or shop for a substitute product at a lower price. The typical utility consumer in today's environment however, is not similarly situated, but is still largely a captive consumer at the only price offered. n154

In the case of the telephone customer, because telephone service has become a necessity, n155 with few or no alternatives, n156 the customer can [*648] not forego the service. Rather, the customer must pay the predetermined rate, even if the rate includes the cost of defending liability suits and damage payments. Thus, a telephone company's limitation of liability for negligence cannot be completely removed because the resulting increase in damage costs would be distributed via increased rates to all customers, many of whom would be unable to bear the loss. This is unjust in the context of a monopoly where subscribers have few, if any, alternatives. Eliminating the limitation of liability might distribute the cost of liability across the entire ratepaying public. It would also, however, create an undesirable tension with the historical goal of universal telephone service n157 by burdening those customers who can barely afford existing rates.

An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. Consumer products are typically sold to individual households that are not in a position to insure against potential injury or loss resulting from faulty manufacturing. The manufacturer is in a better position to insure against loss. In those situations where goods are sold to large industrial customers, however, equal bargaining power enables the parties to make any liability or limitation thereof a contractual matter under the terms of the transaction. n158 Conversely, typical telephone customers n159 who would incur significant loss as a result of an outage such as the service interruption following the Hinsdale fire n160 are large industrial and commercial customers who can insure against losses. The telephone company, however, is probably not in a position to insure itself against liability. The California Public Utilities Commission recognized this when it cited the unavailability of insurance for utilities against liability of this kind as a significant factor in its decision to sustain telephone company limitation of liability for service and directory errors. n161 [*649]

Although new regulatory paradigms n162 still limit utilities' ability to pass all costs directly to the ratepayer, n163 the changes are not significant enough to subject local telephone companies to unchecked liability, n164 especially in light of the magnitude and complexity of the service they provide. n165 Thus, opposing interests must be carefully weighed in developing the correct degree of liability a telephone company should be exposed to under the current regulatory framework. Increased earning potential and limits on rate increases suggest local telephone companies should assume commensurate risk. n166 On the other hand, established tort principles continue to provide sound arguments against a carte blanche assumption of liability n167 and suggest caution when contracting the broad limitation currently in place in many jurisdictions.

IV. Proposal

Assuming that the cost of unlimited liability is too great an imposition on the telephone company and its ratepayers, a more appropriate method of risk sharing under current regulatory scenarios is a moderate expansion of telephone company liability. Moderation is warranted because many telephone customers could not absorb the rate increase that would be necessary to protect the telephone company from the increased cost due to complete liability.

Illinois House Bill 4026, proposed in April of 1992, n168 illustrates an attempted but unsuccessful alteration of the limitation of liability. In pertinent part, the proposed bill would have prevented the regulatory commission from approving any rate, charge, classification, or tariff that would limit a utility's liability for direct or indirect losses due to disrup [*650] tion of service that exceeds twenty-four hours. n169 The bill's failure n170 was probably attributable to its broad language.

Such sweeping language removes all limitation of liability for outages over twenty-four hours, and signals too dramatic a change because unlimited recovery of damages in the instance of service failure or telephone company error is inconsistent with both regulatory needs and principles of common law. n171 Although legislation might be a solution to constricting the unbridled indemnity that currently exists, language in any such legislation should be carefully constructed to tailor the limitation instead of eliminating it.

A more practical alternative would be to follow the practice of several states that have refused to uphold limitation of liability provisions unless the corporation is still liable for acts of gross negligence. n172 This expansion of duty on the part of telephone companies increases the level of customer protection without imposing theoretically unlimited liability. It further provides a measure of incentive for utilities to maintain adequate service quality standards and to continue technological efforts to provide alternative routing. n173

Under this system, once the plaintiff proves gross negligence or wanton misconduct, the tariff provision might subject the company to a penalty, dependent on the length of outage. Thus the telephone company is forced to compensate some customers, but not to the extent that rates are dramatically increased. A system similar to this proposal is the tariff clause mandated by the California Utilities Commission which limits recovery to $10,000 when a plaintiff proves gross negligence. n174 This "limited limitation" is consistent with new forms of telephone regulation, allowing local telephone companies to operate less as a regulated monopoly, but affording adequate protection in the areas which are still under relatively strict oversight.

Utility commissions should also mandate telephone company quality standards that reduce the chance of an interruption. Many of the new regulatory scenarios include quality standards as factors in the earnings formula. n175 The necessity of such mandates may abate as true competitive market conditions penetrate the local telephone marketplace. In the short term, however, regulatory commissions should oversee service quality levels to ensure that new regulatory paradigms, which allow in [*651] creased earnings levels, do not compromise system reliability. Additionally, nonmandated technological service "insurance," such as customer specific route diversity, n176 should be encouraged because such services can have the effect of passing the cost of insurance directly to those customers who most need and can most afford this protection. Such technological offerings allow the demands of the marketplace, rather than regulatory mandates, to ultimately drive the quality of service.

V. Conclusion

Historically, the public policy justification for limiting telephone company liability for outages and errors is founded on the traditional regulatory model. n177 Since the divesture of AT&T and the rapid changes in telecommunications regulation, however, telephone companies have been given greater flexibility in earnings and pricing. n178 Due to the easing of regulatory strictures, complete limitation of liability for telephone company errors and outages is less compelling in today's regulatory environment. The nature of the telecommunications industry and the local telephone companies, however, necessitates a moderate alteration of the limitation. Thus, telephone companies should suffer some financial penalty for damages resulting from gross negligence, and utility commissions should include quality standards as a requisite index in any price sharing or earnings formula.

FOOTNOTES:

n1. Maria Hunt et al., Fire Wipes Out Phones in West Suburbs, Chi. Trib., May 9, 1988, 1, at 1.

n2. *In re Ill. Bell Switching Station Litig.*, No. 73999, *1993 Ill. LEXIS 65*, at *2-3 (Ill. Aug. 26, 1993).

n3. Id. at *4.

n4. Stevenson Swanson et al., Phone Repair Woes Mount Bell Problems Reach Out and Touch Millions, Chi. Trib., May 15, 1988, 1, at 1.

n5. *In re Ill. Bell*, No. 73999, *1993 Ill. LEXIS 65*, at *4.

n6. Id. at *11-12. The tariff provides:

The liability of the Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission occurring in the course of furnishing service or other facilities, and not caused by the negligence of customer, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission occurs. No other liability shall in any case attach to the Company.

Id. The appellate court also held that the "economic loss" doctrine articulated in *Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982)*, precluded recovery. The Illinois Supreme Court, however, reasoned that the doctrine did not bar recovery. Id. at 15-16. *In re Ill. Bell*, No. 73999, *1993 Ill. LEXIS 65*, at *4. The discussion of economic recovery in tort, however, is beyond the scope of this note.

n7. Id. at *1.

n8. Id. at *12. The Illinois Supreme Court held that the plaintiffs asserted a valid claim for civil damages pursuant to 5-201 of the Public Utilities Act. Id. The statute provides:

In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Illinois Commerce Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by way of punishment.

220 ILCS 5/5-201 (West 1992).

In In re Illinois Bell, the court distinguished previous appellate court rulings where exculpatory provisions were held to preclude the recovery of consequential damages for interruption of phone service, because, in contrast to the In re Illinois Bell claim, the previous cases did not involve statutory damages claims brought under 5-201 of the *Utilities Act. In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65*, at *8. At the time of this writing, a motion for rehearing is pending before the Illinois Supreme Court.

n9. *In re Ill. Bell Switching Station Litig., 234 Ill. App. 3d 457, 463-64, 596 N.E.2d 678, 682, 173 Ill. Dec. 54, 58 (1st Dist. 1992)*, rev'd, *No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993).

n10. See *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)* (justifying tariff limitation of liability for telephone company directory omissions and errors in partial consideration for state regulation and control).

n11. Robert B. Horowitz, The Irony of Regulatory Reform 132 (1989) ("Regulation granted local telephone monopoly franchises and secured the stabilization of business risk ... In return, regulation was able to "extract" from telephone companies the public interest obligation of service to all - 'universal service.' "); see also Paul E. Teske, After Divestiture 2 (1990).

n12. Ithiel de Sola Pool, Technologies of Freedom 101 (1983).

n13. Walter G. Bolter et al., Telecommunications Policy for the 1990s and Beyond 131 (1990).

n14. See infra notes 19-75 and accompanying text.

n15. See infra notes 76-119 and accompanying text.

n16. See infra notes 120-67 and accompanying text.

n17. See infra notes 168-76 and accompanying text.

n18. See infra notes 177-78 and accompanying text.

n19. Ronald A. Case, Annotation, Liability of Telephone Company to Subscriber for Failure or Interruption of Service, *67 A.L.R. 3d 76, 83 (1975)*; see also *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192-93 n.9 (5th Cir. 1986)* (citing cases from 29 states regarding limitation of liability provisions in telephone company tariffs); *Wilhite v. South Cent. Bell Tel., 693 F.2d 340, 342 (5th Cir. 1982)* (citing jurisdictions where, absent wilful or wanton conduct, courts uphold limitation of liability clauses); *University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554 P.2d 723, 726 n.1 (Colo. Ct. App. 1976)* (providing an extensive list of decisions upholding limitation of liability clauses in telephone company yellow page advertising cases).

n20. Horowitz, supra note 11, at 100.

n21. See Richard M. Owen & Ronald Braeutigam, The Regulation Game 200 (1978). The Mann-Elkins Act extended the Interstate Commerce Commission's (ICC) jurisdiction to include the telephone, telegraph, and cable companies engaged in transmission of interstate (or intercountry) messages.

n22. Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934). The administrative deficiencies both of ICC oversight of wired communications and oversight of radio saw legislative proposals as early as 1929 to consolidate federal authority over communications in one agency. In response, Congress created the Federal Communications Commission (FCC) under the Communications Act of 1934. The Communications Commission's mandate was vague, requiring that carriers provide good service at reasonable rates. Horowitz, supra note 11, at 122, 126. The 1934 Communications Act authorized continuing federal institutional involvement in telephone regulation by establishing the FCC, thereby articulating the goal of universal, affordable service. Teske, supra note 11, at 2.

n23. *47 U.S.C.S. 152* (1989).

n24. See Horowitz, supra note 11, at 100. State telephone regulation began in 1907 with establishment of the New York and Wisconsin public utility commissions. Most states formed public utility commissions shortly thereafter. Teske, supra note 11, at 2.

n25. Telephony in the United States has not always had a monopolistic structure. The expiration of the Bell patents in 1893 sparked fierce competitive battles as the number of telephones increased 1000% between 1893 and 1907. In many instances, as a result of the growth, numerous telephone companies operated in concurrent locales. Bell, however, began an aggressive consolidation, and reduced the number of "independent" telephone companies and emerged the dominant force in the market. Alarmed at these developments, public policy makers at the state and federal level intervened. Bolter et al., supra note 13, at 75-76.

n26. See, e.g., *Or. Rev. Stat. 756.040* (1992) ("The commission is vested with power and jurisdiction to supervise and regulate every public utility ... and to do all things necessary and convenient in the exercise of such power and jurisdiction."); *Va. Code Ann. 56-35* (Michie 1993) ("The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.").

n27. This doctrine of universal service is the common underpinning of legislative intent and scholarly analyses of the history of regulatory origin and is called the "public interest" theory of regulation. The public interest theory of regulation views the administrative agency as functioning as a watchdog for the general welfare through oversight of rates and profit levels. Horowitz, supra note 11, at 23-25.

n28. "Universal service meant that telephone service must be made available to and be generally affordable by everyone." Id. at 132. The statutory basis for this is usually found in the language of state public utility acts. For example, in California, the Public Utility Code provides: "The Legislature finds and declares that ... the offering of high quality basic telephone service at affordable rates to the greatest number of citizens has been a longstanding goal of the state." *Cal. Pub. Util. Code 871.5* (West 1993).

n29. The justification for regulating telephone companies' return on investment has been that they are monopoly providers. Theoretically, in the absence of regulation, they could command prices significantly above what a competitive market would allow. Rate of return regulation attempts to make the incentive for investing in a monopoly service similar to that possible in nonmonopoly services. Greatly simplified, this process consists of determining the rate base - the cost of providing service including depreciation and taxes - and adding to that a reasonable profit or return sufficient to attract the capital necessary for investment. There are a number of problems associated with this method, including the incentive for the firm to overinvest since its rate of return is based on total capital investment, and the discouragement of operating efficiencies because the benefits of cost-saving techniques flow to the consumers rather than providing additional profit to the firm. David Twenhafel et al., Introduction to Telecommunications Policy and Economic Development 1, 4 (Jurgen Schmandt et al. eds., 1989).

n30. Bolter et al., supra note 13, at 131.

n31. See *Southern Bell Tel. & Tel. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* (indicating utility commission must require a level of service and reasonable rates).

n32. Teske, supra note 11, at 5.

n33. Amid a growing trend towards deregulation and mounting competitive interest in telecommunications, the U.S. Department of Justice brought suit against AT&T to end its powerful vertical integration through divesture of Western Electric and the Bell operating companies. *United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982)*. Between 1974 and 1982, AT&T lobbied heavily to defeat the antitrust case, but was unsuccessful in its bid to have legislation passed protecting the monopoly structure. On January 8, 1982, the Department of Justice and AT&T reached a settlement in the case, resulting in the divesture of both Western Electric and the operating companies, which were spun off as the seven separate and independent regional monopolies. Horowitz, supra note 11, at 241. For an in depth discussion of the AT&T antitrust action and divesture, see Steve Coll, The Deal of the Century: The Breakup of AT&T (1986).

n34. Twenhafel et al., supra note 29, at 1.

n35. *AT&T, 552 F. Supp. at 131.*

n36. Bolter et al., supra note 13, at 131.

n37. Price caps can be a feature of incentive regulation plans, see infra note 38, but the term generally refers to a method of capping basic prices. Dawn Bushaus, State Regulators: Incentive Regulation Local Competition a Top Agenda - What's Best for Ratepayers?, CommunicationsWeek, Aug. 26, 1991, at 22F hereinafter Bushaus, Incentive Regulation. Under such plans, regulatory commissions set ceiling and floor rates for competitive services and let telephone companies adjust their rates within the limits. Dawn Bushaus, States Easing Local Regulations - New Incentive Plans Allow Pricing Flexibility in Return for Productivity Guarantees, CommunicationsWeek, July 27, 1992, at 27 hereinafter Bushaus, States Easing.

n38. Incentive regulation means letting a telephone company keep a certain portion of their profits, provided they can keep costs down. Bushaus, Incentive Regulation, supra note 37, at 22F.

n39. Under the rate stabilization approach, carrier rates are generally reduced if earnings exceed authorized levels and, conversely, rates will rise if earnings are deficient. Bolter et al., supra note 13, at 137; see also Gail G. Schwartz & Jeffrey H. Hoagg, Virtual Divestiture: Structural Reform of an RHC, *44 Fed. Comm. L.J. 285 (1992).*

n40. These characteristics are evident in examples of innovation in telephone regulation in Vermont, Alabama, and Nebraska. In 1987, Vermont entered negotiations leading to a "social contract" between the Vermont Service Board and New England Telephone Company (NET). Twenhafel et al., supra note 29, at 185. The terms of the Vermont agreement require stabilized local rates, shifting of the risk associated with inflation to the telephone company, and limited increases for certain services. Although the plan does not guarantee New England Telephone Company a reasonable return on its investment, neither does it limit NET's ability to earn. Bolter et al., supra note 13, at 132. In 1990 the Alabama Public Service Commission extended a form of incentive regulation, called a "Rate Stabilization and Equity Plan," for South Central Bell. The plan allows several tiers of rates of return and includes service measurements. Alabama Continues SCB Alternative Regulation Plan Three More Years With Minor Changes, Telecommunications Reports, Nov. 19, 1990, at 24. An even more radical regulatory shift occurred in Nebraska where the Supreme Court of Nebraska recently refused to void legislation totally deregulating telecommunications. The court's decision followed several years of legislative and judicial activity and provides Nebraska telephone companies considerable freedom from rate of return regulation. 1990 A.B.A. Sec. Pub. Util., Comm. & Transp. L. Ann. Rep., at 147.

n41. Mary Nagelhout, Incentive Regulation of Local Exchange Telephone Carriers, Pub. Util. Fort., July 1, 1991, at 46.

n42. Id. For example, the California Public Utilities Commission adopted an incentive-based regulation framework for that state's two largest telephone companies which included Commission oversight of the quality of service. Id. The Nevada Public Service Commission approved an alternative regulatory scheme in 1990 that included as a goal the improvement of the quality of telephone service to customers. The plan also was intended to encourage local exchange telephone companies to take maximum advantage of modern telecommunications technology. Id. at 48.

n43. Andrew Fegelman, New Rules Aim to Prevent Fires That Would Snarl Phone Service, Chi. Trib., Sept. 25, 1991, 2, at 4.

n44. See supra notes 1-3 and accompanying text.

n45. Fegelman, supra note 43, at 4.

n46. Dennis L. Weisman, The Emerging Market for "Faultless" Telecommunications, Telecommunications Pol'y, Aug. 1990, at 333, 336.

n47. Id. at 338.

n48. See infra notes 52-68 and accompanying text.

n49. See infra notes 76-119 and accompanying text.

n50. The Illinois Supreme Court's recent holding refusing to limit liability despite exculpatory language in Illinois Bell's tariff was unrelated to the form of regulation. *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993). See infra notes 1-8 and accompanying text.

n51. Brooks B. Albery & Peter J. Grandstaff, Local Transport Competition in U.S. Telecommunications, Telecommunications Pol'y, Dec. 1989, at 355 (noting divestiture has actually increased telecommunications regulation). For example, in 1992, the Chesapeake & Potomac Telephone Company (C&P) of Maryland asked the Maryland Public Service Commission to extend the current price-cap plan (in operation the past two years) for another six years. C&P of Maryland Makes Case for Rate Changes, CommunicationsWeek, June 1, 1992, at 3. However, under the plan, C&P must still gain Commission approval of rate changes for many services such as residential service, business lines, and advanced calling services such as call waiting and call forwarding. Id. In California, an incentive-based regulation framework placed basic monopoly services in a category subject to fixed rates, and indexed other rates to an indexing mechanism. Nagelhout, supra note 41, at 46. In Illinois, in 1993, Illinois Bell Telephone Company proposed a price cap plan that would freeze local rates for three years and allow other rates to change based on a formula considering inflation, Bell's efforts to cut overhead costs, and the quality of service. Rob Karwath, Bell Seeks Rate Overhaul, Chi. Trib., Dec. 1, 1992, 1, at 1. Few states have reached the extreme deregulatory stance of Nebraska, where local telephone companies can increase local prices up to 10% annually, with 90 days notice, unless 2% of affected consumers sign a petition opposing the increase. Some services are nearly free of any rate of return regulation. Teske, supra note 11, at 116-17.

n52. An example of such a statute is as follows:

No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical areas or areas in which the service shall be offered or provided. The Commission may prescribe the form of such tariff and any additional data or information which shall be included therein.

220 ILCS 5/13-501 (1993).

n53. *Correll v. Ohio Bell Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939).*

n54. *Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 136 N.E.2d 1 (2d Dist. 1956).*

The company's official tariff filed with the state utility commission ... is a part of the terms and conditions upon which telephone service is rendered, is necessarily a component and integral part of its contracts and relationships with its subscribers, expressly or by implication or by operation of law; the subscribers are bound thereby, as is the company; it cannot deviate and its subscribers cannot deviate therefrom; ...

Id. at 58, 136 N.E.2d at 8. But see *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65,* at *12 (Ill. Aug. 26, 1993) ("Nothing in the Public Utilities Act or the Commission's regulations authorizes a utility to exempt itself from this liability by means of a tariff.").

n55. See *Cole v. Pacific Tel. & Tel. Co., 94 P.2d 216, 218-19 (Cal. Ct. App. 1952)* (citing *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571-72 (1921)).*

n56. See *Riaboff v. Pacific Tel. & Tel. Co., 102 P.2d 465* (Cal. App. Dep't Super. Ct. 1940). Limitation of liability clauses are not unique to telephone companies, and can be found in the tariffs of other utilities and common carriers. See *Lee v. Consol. Edison Co. of N.Y., 413 N.Y.S.2d 826 (N.Y. App. Div. 1978)* (sustaining electric utility's provision of limitation of liability where tariff exempts utility from liability for ordinary negligence and renders it liable for gross negligence only). But see *Boston & Me. R.R. v. Piper, 246 U.S. 439, 445 (1918)* (finding railroad's liability limitation invalid as in violation of specific statutory language prohibiting exculpatory clauses); *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65,* at *2-3 (Ill. Aug. 26, 1993) (holding state statute negated effect of exculpatory tariff language).

n57. Pool, supra note 12, at 101. Telegraph companies are classified as instruments of commerce, transporting messages across state lines. Similar to telegraph companies, telephone companies are obligated to serve all interested customers; they owe a clear duty to the public to provide quality message service at reasonable rates. *Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 (1893);* see also *Telegraph Co. v. Texas, 105 U.S. 460, 464 (1881).*

n58. *154 U.S. 1 (1893).*

n59. *Id. at 14.*

n60. *Id. at 14-15.*

n61. Id.

n62. *Id. at 14-15, 33-34.*

N63. See *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1164-66 (Cal. 1974)* (citing numerous California court cases upholding telephone companies' right to limited liability on the theory that strict regulation necessitates curtailed liability); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459-60 (Ga. Ct. App. 1974)* (holding reasonable limitation of liability for damages for interrupted telephone service is part of the rate-making function).

n64. *27 N.E.2d 173, 174 (Ohio Ct. App. 1939).*

n65. Id.

n66. *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192 n.9 (5th Cir. 1986)* (citing 26 jurisdictions where courts have ruled favorably for defendants in cases involving directory errors or omissions). The majority of courts hold limitation of liability clauses to be valid; the exception is the few instances where certain jurisdictions refuse to uphold the limitation in cases of directory listing errors and/or omissions, particularly for yellow pages listings. See *Underwood v. South Cent. Bell Tel. Co., 590 So. 2d 170 (Ala. 1991)* (holding limitation of liability clause unconscionable in directory omission case); *Anchorage v. Locker, 723 P.2d 1261 (Alaska 1986)* (holding tariff provisions protecting regulated subjects from liability did not apply to yellow page advertising); *Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689 (Mich. Ct. App. 1969)* (relying on monopolistic nature of yellow pages and holding clause limiting liability unenforceable due to disparity of bargaining power between parties).

n67. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (denying claim for telephone directory omission based on telephone company exculpatory tariff clause).

n68. See generally *Southwestern Sugar & Molasses Co. v. River Terminals, 360 U.S. 411, 417 (1959)* (giving effect to exculpatory clause in tariff filed by common carrier with Interstate Commerce Commission); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 460 (Ga. Ct. App. 1974)* (finding fixing of utility rates is not a matter of private contract, and limited liability for damages for interrupted telephone service is an inherent part of rate).

n69. Case, supra note 19, at 83.

n70. Id.

n71. See, e.g., *Robinson v. Southwestern Bell Tel. Co., 366 F. Supp. 307, 311 (W.D. Ark. 1972)* (stating that in Arkansas liability limitation will not stand in the face of wilful and wanton misconduct or gross negligence); *Wheeler Stuckey Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 714-15 (W.D. Okla. 1967)* (holding that telephone company may limit its liability in tariff language approved by the Oklahoma Corporation Commission so long as it does not seek immunity from gross negligence or wilful conduct); *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1167 n.9 (Cal. 1974)* (noting California's imposition of liability for gross negligence); *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590 (Nev. 1992)* (holding Nevada Bell tariff limitation of liability provision does not apply to wilful, wanton or gross negligence); *Abraham v. New York Tel., 380 N.Y.S.2d 969, 972 (N.Y. Civ. Ct. 1976)* (upholding New York Public Service Commission's limitation of liability to acts or omissions of gross negligence).

n72. *Valentine v. Michigan Bell Tel. Co., 199 N.W.2d 182 (Mich. 1972)* (holding tariff provision unconscionable as to tort claim, but in dicta stating pleadings indicated a lack of proof of negligence on part of telephone company). But cf. *Ivenchek, Inc., 204 S.E.2d at 457* (denying plaintiff's contention that tariff limitation of liability was invalid).

n73. *Wheeler Stuckey, Inc., 279 F. Supp. at 714* (denying telephone customer's claim for actual and punitive damages for alleged negligent conduct by telephone company in yellow pages publishing); Proposed Report Regarding Limitation of Liability for Telephone Corporations, Adopted, Cal. Pub. Util. Commission, Dec. No. 77406, Case No. 8593, (1970) hereinafter California PUC Report.

n74. In 1970, the California Public Utilities Commission undertook an intensive investigation into limitation of liability and concluded the rule has worked reasonably well and has enabled the telephone companies "to provide service to the public at a lesser cost than would be the case if the rules permitted greater liability for errors and omissions." California PUC Report, supra note 73, at 18.

n75. *Bulbman, Inc., 825 P.2d at 590* (noting that most jurisdictions hold that liability limitation should be upheld when the claim is for simple negligence).

n76. See infra notes 77-115 and accompanying text.

n77. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1988)* (holding that regulation of liabilities to some extent is necessary to "strike an equitable balance of benefits and burdens").

n78. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (holding limitation of liability is an inherent part of regulated telegraph rates).

n79. *Wilkinson v. New England Tel. & Tel. Co., 97 N.E. 413, 416 (Mass. 1950).* The rationale for limitation of liability adopted by a few courts, especially in the earlier years of telephony, focused on the technological nature of the telephone industry. In Wilkinson the plaintiff alleged faulty service, including erroneous busy signals and failure of the telephone to ring when a call was placed. The court held the failure of the plaintiff to sufficiently allege wanton or wilful misconduct on the part of the defendant precluded recovery under the limitation of liability clause because of the telephone company's inability to control all sources of potential service failure. Id.

n80. *Waters v. Pacific Bell Tel. Co., 523 P.2d 1161 (Cal. 1974).*

n81. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 688 (Cal. Ct. App. 1952)* (holding customer could not recover for damages allegedly suffered from telephone directory error when telephone company tariff contained limitation of liability clause).

n82. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1980)* (justifying limitation as necessary to offset regulatory burdens).

n83. *Great N. Util. Co. v. Public Serv. Comm'n, 293 P. 294, 298 (Mont. 1930)* (explaining utility commission powers to regulate and control utilities (citing *Munn v. Illinois, 94 U.S. 113, 140 (1877)*)).

n84. See *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* ("It is the responsibility of the commission to require a regulated utility to provide a level of service within its service area ... consonant with this responsibility the commission must approve utility rates ....") (quoting *Georgia Power Co. v. Public Serv. Comm'n, 201 S.E.2d 423, 427 (Ga. 1973)*).

n85. See *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 528-29 (Mont. 1972).*

n86. Horowitz, supra note 11, at 132.

n87. *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952).*

Since the telephone company renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control its liability is and should be defined and limited ... In a sense it is a matter of contract, on the one hand by the utility; and on the other by the state representing all its citizens.

Id. (quoting *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)).*

n88. *Wilkinson v. New England Tel., 97 N.E.2d 413, 416 (Mass. 1951)* ("This regulation is not solely a limitation of damages in case of failure of service. Its purpose is rather to limit and define the duty ... to supply service."); see also *Julington Creek Marina, Inc. v. Southern Bell Tel. & Tel. Co., 35 Fla. Supp. 183, 185 (Cir. Ct. 1971).*

n89. *Julington Creek Marina, 35 Fla. Supp. at 185.*

n90. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing company would be subject to enormous liability if responsible for every telephone service disruption).

n91. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (allowing limited liability of telegraph company for unrepeated telegraph messages); *Davidian v. Pacific Tel. & Tel. Co., 94 Cal. Rptr. 337, 339 (Ct. App. 1971)* (noting commissions take into consideration limitation of liability when fixing rates for telephone service); *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (recognizing reasonable rates are dependent on limitation of liability rules).

n92. *256 U.S. 566.*

n93. *Id. at 571.*

n94. Id.

n95. *360 U.S. 411 (1959).*

n96. *Id. at 417-18.*

n97. See *Esteve Bros., 256 U.S. at 573.*

n98. *Id. at 566.*

n99. *Id. at 572.*

Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement, still less by ... lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but as a matter of law by which uniform liability was imposed.

Id.

n100. *Id. at 573* ("Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all."); see also ***Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928)*** ("The established rates ... thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent."); *Sims v. Western Union Tel. Co., 236 N.Y.S.2d 192, 195 (Sup. Ct. 1963).*

n101. *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 997 (N.M. Ct. App. 1983)* ("The limitation exists as an integral part of the rate-making function, a function that is totally regulated by state and federal agencies.") (quoting *Pilot Indus. v. Southern Bell Tel. & Tel. Co., 495 F. Supp. 356 (1979)).*

n102. *Southern Bell Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459 (Ga. Ct. App. 1974).* "What is just and reasonable to be charged, what is actuarially sound, what limitations of liability are necessary to reach this result, are matters which need to be taken into account in the determination of public utility rates, just as there are proper actuarial considerations in fixing insurance premiums." Id.

n103. *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1166 (Cal. 1974).*

n104. *Id. at 1166.*

It stands undisputed that the commission has approved a general policy of limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance, and has relied upon the validity and effect of that policy in exercising its ratemaking function. It also appears clear that to entertain suits for damages as a result of service interruption ... would thwart the foregoing policy.

Id.

n105. *State ex rel. Western Union Tel. Co. v. Public Serv. Comm'n, 264 S.W. 669, 671 (1924)* ("The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of common law.").

n106. Id.; see also Horowitz, supra note 11, at 132 (discussing regulation of AT&T as a monopoly and noting "the stabilization of business risk was accomplished through a guaranteed fair rate of return and a policy of long-term capitalization.").

n107. See *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 572 (1921).*

n108. See *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1164 n.5 (Cal. 1974)* (acknowledging "that considerations of public policy which might be applicable to disputes between public parties are not necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body.") (citing *E. B. Ackerman Importing Co. v. Los Angeles, 394 P.2d 566, 569 (Cal. 1964)).*

n109. See Horowitz, supra note 11, at 132.

n110. *Waters, 523 P.2d at 1164* (noting that reasonable telephone rates are in part dependent on limitation of liability rules); see also *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing telephone companies would be forced to raise rates to cover increased cost of providing service absent limitation of liability); California PUC Report, supra note 73, at 18 (noting that one effect of limitation of liability rules has been to enable telephone companies to provide service to the public at a lesser cost than if greater liability were permitted).

n111. *Abraham v. New York Tel. Co., 380 N.Y.2d 969, 972 (Civ. Ct. 1976); Garrison v. Pacific Northwest Bell, 608 P.2d 1206 (Or. Ct. App. 1980).* Rate of return regulation is cost based - thus all costs of service are imputed into the rate base, and ultimately made part of the rate. See generally Twenhafel et al., supra note 29, at 4.

n112. *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n113. See *Great N. Util. Co. v. Public Serv. Comm'n, 293 P.2d 294 (Mont. 1930).*

n114. See *Peacock's, Inc., 455 So. 2d at 698 (La. Ct. App. 1984)* (denying recovery for alleged failure of telephone lines connected to alarm system).

n115. See supra notes 81-113 and accompanying text.

n116. Bolter et al., supra note 13, at 84-85.

n117. Horowitz, supra note 11, at 241.

n118. See infra notes 119-76 and accompanying text.

n119. See infra notes 120-67 and accompanying text.

n120. "Other things being equal." Webster's Third New International Dictionary 368 (1981).

n121. Roger M. Noll, The Future of Telecommunications Regulation in Telecommunications Regulation Today and Tomorrow 41, 44 (Eli M. Noam ed., 1983); see also Bolter et al., supra note 13, at 84-85.

n122. See generally Teske, supra note 11 (analyzing state telecommunications regulatory decisions following the industry wide change precipitated by the divestiture of local telephone operating companies from AT&T in 1984).

n123. See supra notes 33-35 and accompanying text.

n124. See supra notes 33-35 and accompanying text.

n125. *United States v. Western Electric Co., No. CIV.A.82-0192, 1982 WL 1882* (D.D.C. Aug. 24, 1982); see Horowitz, supra note 11, at 241.

n126. Teske, supra note 11, at 13-14.

n127. See supra notes 19-119 and accompanying text.

n128. See supra notes 82-90 and accompanying text.

n129. Bushaus, States Easing, supra note 37, at 27 ("As the local telecommunications environment grows more competitive, state utility commissions nationwide are opening up their regulations to encourage innovation and lower the cost of services.").

n130. See supra notes 81-90 and accompanying text.

n131. See, e.g., *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 529 (Mont. 1972).*

n132. Horowitz, supra note 11, at 102-03. "Regulation substituted a guaranteed return on capital and management freedom for the uncertainties of the marketplace. This was precisely the kind of regulation Vail president of AT&T had sought." Id. at 103. "AT&T did not actively oppose ... regulation. In fact, it suggested that regulation might serve as a substitute for competition by, among other things helping to resolve the problems posed by duplicated services." Owen & Braeutigam, supra note 21, at 200.

n133. Owen & Braeutigam, supra note 21, at 200.

n134. Id. at 11.

n135. Bolter et al., supra note 13, at 43.

n136. See supra notes 105-14 and accompanying text.

n137. See, e.g., *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n138. Bushaus, Incentive Regulation, supra note 37, at 27.

n139. Nagelhout, supra note 41, at 46 (stating that as the competitive telecommunications market continues to evolve, state regulators are increasingly willing to ease the regulatory burden imposed on local telephone carriers.").

n140. Alain de Fontenay et al., Local Competition and Resale of Network Services in the USA, Telecommunications Pol'y, Mar. 1987, at 45, 53, 56 (noting differential regulatory treatment between local telephone companies and their competitors).

n141. See supra notes 112-14 and accompanying text.

n142. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590-91 (Nev. 1992)* (indicating that absent liability limitations, broad liability exposure would create tremendous pressure on utility service rates).

n143. Nagelhout, supra note 41, at 46.

n144. Id.

n145. Karwath, supra note 51, at 1. Illinois Bell proposed a plan with prices tied to a formula based on such variables as inflation, company productivity, and quality of service. Id. The proposal also includes a three-year freeze on local rates. Id. Under the proposed scheme, Illinois Bell would be able to earn above the current fixed 13.1% rate of return. Id.

n146. Id.

n147. Arguably, if certain rates are frozen for a period of years, a telephone company and a commission could study more accurately the actual impact of increased liability for outages to make a more informed assessment of the degree of increased costs the change creates. The speculative assessment of the cost of increased liability may not match the actual experience.

n148. Rob Karwath, Bell Rate Plan Appears Right on Line, Chi. Trib., Dec. 2, 1992, 1, at 1 (noting new regulatory plans allow telephone companies to earn higher profits).

n149. See supra note 40.

n150. W. Page Keeton et al., Prosser and Keeton on the Law of Torts 4, at 24 (5th ed. 1984).

n151. Id.

n152. Id. at 25.

n153. A telephone company does not have a duty to provide flawless, uninterrupted service, but is only required to provide "reasonable" or "adequate" service. See, e.g., *Or. Rev. Stat. 759.035* (1992) ("Every telecommunications utility is required to furnish adequate and safe service"); *Va. Code Ann. 56-234* (Michie 1993) ("It shall be the duty of every public utility to furnish reasonably adequate service and facilities"). While technological innovation has created a much more reliable network, the vastness and interconnective nature of the system are inconsistent with imposition of such a broad duty. If a telephone company were required to provide perfect service, such a duty would impose a standard of strict liability. This is not only economically infeasible with such an intangible product, but unjustified without the traditional rationales of strict liability such as an abnormally dangerous enterprise. Keeton et al., supra note 150, at 546 (strict liability has been said many times to be confined to things or activities which are "extraordinary," "exceptional," or "abnormal").

n154. See supra notes 97-100 and accompanying text.

n155. *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1166 n.8 (Cal. 1974)* ("Telephone service is a business and a personal necessity, and the subscriber thereto ordinarily would not be motivated by the availability of damages in the event of negligent service.").

n156. As technological innovations bring competition to even local service, alternatives may be more reasonably priced. Currently, while pagers and cellular telephone service are local service alternatives, the average customer views such services as adjunct, specialized services, and not as a substitute for local residential service. Jennifer Jarrutt & Joseph F. Coates, Future Use of Cellular Technology, Telecommunications Pol'y, Feb. 1990, at 78.

n157. See supra note 28.

n158. See, e.g., U.C.C. 2-509(4) (1978) (allowing parties to enter into contractual agreements shifting risk of loss).

n159. When examining the risk of liability, or the extent of the duty to a customer, one of the troubling issues is the heterogenous mixture of the customer base. Telephone usage valuation varies from one customer to another. The spectrum of utility of the service is broad, from luxury item (i.e., fixed income household) to a major source of revenue (i.e., telemarketing firms). With such a variety of uses, the value of a telephone outage will vary drastically between different customer groups. Bolter et al., supra note 13, at 43. For example, a three-hour outage may be transparent to a residential customer who is not home at the time of the interruption, but the same outage could result in a major loss of both current and future profits for a stock brokerage firm. Assuming that all costs eventually find their way into increased rates, it is questionable if equity is served by requiring all ratepayers to insure the relatively few customers who would experience great loss in the event of service interruption.

n160. See supra notes 1-4 and accompanying text.

n161. California PUC Report, supra note 73, at 12 ("at the present time, no liability insurance is available to insure against service or directory errors. If a change in the limitation of liability rule results in payouts greater than at present the money must come from the revenues of the company affected.").

n162. See, e.g., supra notes 40-42.

n163. See supra notes 143-47 and accompanying text.

n164. The concepts of actual and proximate cause are also inconsistent with creating carte blanche recovery for customer service failure. For example, if a home is burglarized, can the plaintiff adequately prove that static on the line was the actual cause of a significant delay in the signal reaching the police station in order to sustain a claim against the utility with the static? Another classic example is the residential fire, where the customer is unable to summon the fire department because of an outage. Is the delay in reaching the fire department the "but for" cause of the loss, or was the nature of the blaze such that the house would have been demolished even without the delay? Of even more difficult proof is proximate cause. How can a telephone company reasonably foresee the value of the communication lost, or the ensuing damages? The "floodgates of litigation" argument surfaces, but in fact, the pervasive number of telephone company customers coupled with the duty of ubiquitous service makes the company assume near unlimited risk, without any ability of the company to manage that risk. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992).* This does create potential for an explosive volume of litigation for all utilities.

n165. *Bulbman, 825 P.2d at 591* (noting that defects and disruption are inevitable when providing service to hundreds of thousands of customers); Keeton et al., supra note 151, at 663 (explaining that in light of the cost-based regulatory process of utilities their civil liability was unique).

n166. See supra notes 137-41 and accompanying text.

n167. See supra notes 150-61 and accompanying text.

n168. H.B. 4026, 87th General Assembly, Illinois, 1992.

n169. Telephone Interview with Pat O'Brien, Public Utilities Committee Clerk, Springfield, Ill. (Feb. 8, 1993).

n170. H.B. 4026, 87th General Assembly, Illinois, 1992.

n171. See supra notes 21-50 and accompanying text.

n172. See, e.g., *Holman v. Southwestern Bell, 358 F. Supp. 727 (D. Kan. 1973); Stern v. General Tel. Co. of Cal., 123 Cal. Rptr. 373, 376 (Ct. App. 1975); Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 996 (N.M. Ct. App. 1983).*

n173. *Stern, 123 Cal. Rptr. at 376* (citing California Public Utilities Commission report that exposure for gross negligence might be an incentive to reduce errors for all ratepayers).

n174. *Colich & Sons v. Pacific Bell, 244 Cal. Rptr. 724, 716 n.4 (Ct. App. 1988).*

n175. See, e.g., supra note 42 and accompanying text.

n176. See supra note 47 and accompanying text.

n177. See supra notes 21-50 and accompanying text.

n178. See supra notes 120-25 and accompanying text.

ATTACHMENT 3

BEFORE THE
COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES, XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, BEFORE THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF KENTUCKY

CASE NO. 2004-00044

TRANSCRIPT OF EVIDENCE

DATE OF HEARING: May 17, 2005

CONNIE SEWELL
COURT REPORTER
1705 SOUTH BENSON ROAD
FRANKFORT, KENTUCKY 40601

your access to certain services." In the letter, it says, "By the way, any amounts that come due from the date of this letter to the date payment is due you must also pay those amounts when this payment is due." Well, with NuVox, we have 1,100 - we get 1,100 bills a month from BellSouth. So, if we get a notice that says there's an amount that's late and, unless we pay that amount by day 15, that all other amounts due during that 15-day period must also be due, there's the risk that either calculation errors on the part of NuVox or by BellSouth's mistakes by their failure to post disputes or payments made to other accounts during that 15-day period that, at the end of that 15 days, you may make payment, but, because of some calculation error, either on the part of NuVox or on the part of BellSouth with regard to posting disputes and posting payments, you could still get service terminated. Our position is that a late payment notice should indicate clearly what amount is due, when it is due, and, if the CLEC makes payment for that amount on that account, that that threat, if you will, of service termination and, more importantly, service termination to the consumer, to the business customers, goes away. For instance, just in this past week, NewSouth received a late payment bill. NewSouth and NuVox together bill amount that, when BellSouth has contract service arrangements, they frequently file those as trade secrets or under seal. So I don't know if it's come up in a competitive environment, although that's what we're trying to prevent going forward.

Q. Is it your testimony today that you have or have not been competing with BellSouth over the last seven years?

A. We have been competing with BellSouth; that's correct.

Q. Okay. Now, let's move to Issue 6. I believe you testified that, with BellSouth's language, BellSouth is attempting to limit liability for direct and foreseeable damages; is that accurate?

A. That's my understanding; yes.

Q. All right. Do you have your supplemental testimony with you?

A. Yes.

Q. And do you have Exhibit A attached to that?

A. Yes.

Q. And if you could, please, sir, refer to Item 6 and look at BellSouth's language on page 4.

A. Okay.

Q. Now, can you, please, advise for me what portion, if any, of BellSouth's language says or indicates that BellSouth is attempting to limit its liability for termination to your Kentucky service?

A. No, not really.

Q. Does the attachment - can you explain what the attachment tells you?

A. The attachment just lists a number of billing account numbers or bands, the payments that are current, where the company has, in fact, credits, and amounts that are due. It also has a line that indicates what amounts have been disputed and acknowledged as disputed by BellSouth.

Q. Can you tell me what became of this notice?

A. I believe that we found that the amount, the $65 amount that had been billed, there was some error with this bill, and so this issue has been resolved, but, as you would imagine, even over $65, when you get a notice that says service is going to be terminated, it starts a Chinese fire drill, especially when you have to make - you have to account for all the other accounts, billing accounts, that may come due in that time period.

Q. Mr. Russell, do you see the customer name listed on this notice?

A. Yes; NewSouth Communications, Inc.

Q. Are you aware of a company with that name?

A. There's no such company called NewSouth Communications, Inc.

Q. Can you explain the relationship between NewSouth Communications Corp. and NuVox Communications, Inc.?

A. NuVox Communications, Inc. acquired NewSouth Communications Corp. by an Agreement, dated May 21, 2004, that all regulatory approvals were received and Integration worked on it to effectuate the merger by December 31, 2004. So NewSouth Communications Corp. is now part of NuVox. There has never been a company called NewSouth Communications, Inc.

Q. Mr. Russell, with respect to Joint Petitioners Exhibit No. 1A, could you explain for me what this document is?

A. This is a notice that NewSouth received on the 19th, again, requesting payment, in this instance, of $18,896 or services would be refused or terminated if payment was not made for that amount and any other amounts that became past due between the 19th and the 4th of May.

Q. Can you explain what became of this notice, Mr. Russell?

A. Yes. NewSouth had, in fact, disputed the amount requested for payment by BellSouth. Sean Cathey, in our essentially disputes group, contacted BellSouth. It's our understanding that BellSouth has now recognized this dispute related to this account.

Q. Now, Mr. Russell, under either of these notices, can

A. That's correct, both that that is our position and that they dispute that.

Q. The charge that you mentioned in your example of $1,000 based on $200 per day, is that BellSouth's tariffed rates for the service advancement?

A. That's what they will charge us in our Agreement. I don't know what their tariffed rates are, and I particularly don't know how often they waive those charges to get the customer.

Q. I just have one more issue, 102, regarding the amount of the deposits that BellSouth requires and whether the CLEC amount should be reduced by past due amounts owed by BellSouth to the CLEC. Has this issue come up for your petitioning, the Joint Petitioners?

A. It has come up in the sense that BellSouth has asked us for a $4 million deposit last year. During that time period when they had sent us that request, they owed us $2.6 million, which we've documented with invoices in a response that we provided in Florida. They also had overbilled us by $2 million. So they had at least $4.6 million that was our money, and, in this time frame, they come and ask us for a $4 million deposit. Our CFO says, "What do you mean? They want more money from us? I mean, they already owe us $4.6 million." In the supplemental testimony of Ms. Blake, she

ATTACHMENT 4

REGULATIONS

Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

James C. Falvey
Sr. Vice President, Regulatory Affairs
Xspedius Communications, LLC.
7125 Columbia Gateway Drive, Suite 200
Columbia, MD 21046

2. REGULATIONS (Cont'd)

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

1. any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentionalact or omission of the Customer, its employees, agents, representatives or invitees; or

2. any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

Issue Date: June 14, 2002 Effective Date: February 12, 2003

Issued By: James C. Falvey, Sr. Vice President Regulatory Affairs
Xspedius Management Co., LLC
7125 Columbia Gateway Drive, Suite 200
Columbia, Maryland 21046

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

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REGULATIONS

2.3 Obligations of the Customer (Cont'd)

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ATTACHMENT 5

RECEIVED
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G.P.S.C.

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DOCKET # 18409
DOCUMENT # 93636

Docket No. 18409-U

In Re: **Joint Petition for Arbitration of NewSouth Communications Corporation, et al of an Interconnection Agreement with BellSouth Telecommunications, Inc Pursuant to Section 252(b) of the Communications Act of 1934, as Amended**

Order on Unresolved Issues

BY THE COMMISSION:

On February 11, 2004, NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC (collectively "Joint Petitioners") petitioned the Georgia Public Service Commission ("Commission") to arbitrate certain unresolved issues in the interconnection negotiations between Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

instead, it is seeking to hold Joint Petitioners accountable for agreeing to terms that are different than the industry standard. *Id.* at 10.

Joint Petitioners

Joint Petitioners allege that BellSouth is seeking to obtain a competitive advantage by requiring CLECs to mirror its tariffed language on limitation of liability, even though BellSouth may negotiate such provisions to lure a customer away from a CLEC. (Joint Petitioner Brief, p. 14). A lot of Joint Petitioners' business is from individual agreements as opposed to tariffs. *Id.* BellSouth's proposed language would punish Joint Petitioners for agreeing to language that differed from what is in BellSouth's tariffs. *Id.* at 15.

Joint Petitioners also state that its proposal incorporates a reasonableness standard; therefore, they would not be able to attract customers by promising exorbitant payments to customers for minor service problems and then recoup that amount from BellSouth. (Joint Petitioner Reply Brief, p. 10).

Staff Recommendation

Staff recommends the Commission order that should Joint Petitioners not limit their liability in accordance with BellSouth tariffs that the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains because of that decision. Adoption of Staff's recommendation would not inhibit Joint Petitioners from negotiating alternative liability arrangements with customers. Rather, it would mandate that they indemnify BellSouth for any losses BellSouth would incur as a result of this decision. Joint Petitioners would not be at a competitive disadvantage because they would be free to negotiate alternative limitation of liability language in an effort to attract a customer. It would not be fair for BellSouth to be put at an increased risk as a result of a CLEC's business decision to offer an end user customer a more favorable limitation of liability provision in their service agreement.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 5.

Item 6

BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?

Joint Petitioner Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customer/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's

(or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages?

Positions of the Parties

BellSouth

BellSouth argues that Joint Petitioners' proposal has no effect as a matter of law because the parties agree that they cannot affect the rights of third-party end users through their interconnection agreements. (BellSouth Brief, p. 16). Further, BellSouth argues that it is unnecessary to include, as Joint Petitioners' propose, language to establish that the limitation of liability regarding indirect, incidental, or consequential damages does not impose "any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder . . ." (BellSouth Brief, quoting from Joint Petitioner Exhibit A at GTC § 10.4.4. BellSouth also argues that Joint Petitioners may use the proposed language to circumvent the limitation of liability provision by bringing a claim for damages "vis-à-vis its End Users." (BellSouth Brief, p. 17).

Joint Petitioners

Joint Petitioners argue that their proposed language clarifies the scope of their voluntary waiver of certain damage claims. This clarification includes language that expressly excludes from the description of "indirect, incidental and consequential damages" damages that "result directly and in a reasonably foreseeable manner . . ." (Joint Petitioner Exhibit A at GTC § 10.4.4). Joint Petitioners argue that their proposed language places an appropriate risk on the parties. (Joint Petitioner Brief, p. 17). Joint Petitioners also state that because BellSouth recognizes the distinction between direct, foreseeable damages and indirect, consequential damages, its argument that Joint Petitioners' proposal would gut the limitation of liability provisions in the agreement are false. (Joint Petitioner Reply Brief, p. 12).

Staff Recommendation

The Staff recommends that the Commission adopt the language proposed by Joint Petitioners with the following modification: "any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party ~~or by such other Party vis-à-vis its End Users~~ to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder . . ." BellSouth's objection that the language as a whole is unnecessary is not persuasive. The language places a clarification on the scope of indirect, incidental or consequential damages. Given that neither party disputes that these damages do not include direct and foreseeable damages, the inclusion of this clarification by itself should not work to either party's disadvantage.

BellSouth did raise a legitimate complaint that the language proposed by Joint Petitioners may allow them to circumvent other provisions in the agreement concerning the limitation of liability. Specifically, this concern relates to the language in the agreement related to limitations of liability elsewhere in Section 10. Joint Petitioners' proposal states that nothing in Section 10 would impose any limitation on the liability of a party for claims for damages incurred by the other party vis-à-vis its end users if those damages were direct and foreseeable. However, Section 10 contains provisions that limit the liability of parties for these types of damages. The effectiveness of those provisions are called into question if a CLEC may claim damages "vis-à-vis" its end users to bring a claim for damages that exceed the liability limitations elsewhere in Section 10. Therefore, the Staff recommends the Commission delete the phrase "by such other Party vis-à-vis its End Users" from Joint Petitioners' proposal.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 6.

Item 7

What should the indemnification obligations of the parties be under this Agreement?

Positions of the Parties

BellSouth

BellSouth argues that Joint Petitioners' proposal is one-sided because it would hold BellSouth, as the primary providing party, responsible for indemnifying a broader range of actions. Whereas the receiving party, under Joint Petitioners' proposal, would be responsible to indemnify the providing party only "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications," the providing party would be required to indemnify the receiving party for "(1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct." (BellSouth Brief, p. 18, *quoting from Joint Petitioner Exhibit A GT&C at §10.5).*

BellSouth also states that Joint Petitioners' position contradicts the conclusion of the FCC Wireline Competition Bureau in the *Virginia Arbitration Order.* (BellSouth Brief, p. 19). The Wireline Competition Bureau held that Verizon did not have to provide "perfect service to WorldCom's customer and should not have to indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. *Virginia Arbitration Order*, at 709. BellSouth alleges that Joint Petitioners' language would

Item 12

Should the Agreement explicitly state that all existing state and federal laws, rules, and regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Positions of the Parties

BellSouth

BellSouth's position is that parties should not be penalized for any ambiguity of silence in the agreement relating to the parties' obligations under telecommunications law, and that parties are not allowed to renegotiate provisions based on a new reading of "Applicable Law." (BellSouth Brief, p. 24). BellSouth states that while it does not disagree that the law in effect at the time of execution of the agreement is automatically incorporated into the agreement, unless otherwise agreed to by the parties, it objects to a party's use of this provision to renegotiate or ignore already agreed upon language. *Id.* at 26.

BellSouth states that its position is consistent with the position reached by the North Carolina Utilities Commission in the *Recommended Order* in Docket No. P-500, Sub 18, *In re: Petition for Arbitration by ITC^DeltaComs.* BellSouth also argues that adoption of Joint Petitioners' proposal would unlawfully require it to arbitrate issues that are not contained in Section 251(b) or (c) of the Federal Telecommunications Act. *Id.* at 28.

BellSouth further argues that under Joint Petitioners' proposal, the parties would have to maintain a list of every instance in which the parties expressly agreed to something other than the law. (BellSouth Reply Brief, p. 20). Finally, BellSouth argues that, under Joint Petitioners' proposal, BellSouth could be found in violation of state unbundling laws that were not referenced by the agreement, even if BellSouth no longer has such an obligation under federal law. *Id.* at 22.

Joint Petitioners

Joint Petitioners argue its position that all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements is consistent with Georgia contract law. (Joint Petitioner Brief, p. 25). As a practical matter, Joint Petitioners argue that it would not be reasonable for the parties to expressly incorporate all elements of generally applicable law into one contract. *Id.* at 26. Joint Petitioners respond to BellSouth's claim that under their proposal an interconnection agreement would not even be necessary. Interconnection agreements must be in writing to be approved by state commissions and to satisfy the Statute of Frauds. *Id.* at 27. In addition, Joint Petitioners argue that BellSouth's argument concerning preemption would be properly handled in a request for declaration of preemption. *Id.* at 30.

Staff Recommendation

The Staff recommends that the Commission adopt Joint Petitioners' proposed language for this item. Parties are presumed to contract with regard to existing law, unless expressly stipulated otherwise. Jenkins v. Morgan, 100 Ga. App. 561, 562 (1959); magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l, 273 Ga. 525 (2001).

BellSouth's argument that Joint Petitioners' proposal would require the parties to make a list of every instance in which they would differ from Applicable Law is not persuasive. This argument necessarily presumes that there was a greement upon terms and conditions that deviate from existing law. In order for a contract to be binding, there must be a meeting of the minds. Dumas v. First Federal Savings and Loan Association, 654 F.3d. 359, 360 (5th Cir. 1981). It is not unduly burdensome for parties that reach this agreement to memorialize it. However, it would be unduly burdensome to require parties to list every instance in which the parties agree to abide by existing law.

The Staff does not find any merit in BellSouth's argument that Joint Petitioners, under their proposal, will be permitted to change its argument as to what Applicable Law was at the time the agreement. If the parties had an understanding at the time of the agreement about a given law, then that law obviously has some relevance to the agreement. If the parties knowingly deviate from the law in question, that deviation should be set forth in the agreement, or else pursuant to Georgia contract law, the parties will be presumed to contract in accordance with it. To the extent the concern is that one party may advance a new and self-serving construction of the law in question at some point after the execution of the agreement, then that party will still have to convince an adjudicating body that its self-serving construction is correct. This task may be made even more difficult if there is any evidence of the parties' intent at the time the agreement was executed.

Finally, the Staff does not agree with BellSouth's scenario that a CLEC could argue that under an Applicable Law provision that BellSouth is in violation of state law that has since been preempted by federal law. If there is a dispute over whether such preemption has taken place, then that dispute should be handled consistent with how any other such dispute would be resolved. If it is acknowledged that such state law is preempted, then the Joint Petitioners would not have any rights under that state law. "Applicable Law" is defined in the agreement as "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to its obligations under this Agreement." (Section 32.1).

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 12.

The Staff recommends rejection of Joint Petitioners' argument that the Commission is not authorized to arbitrate this issue because it was never negotiated by the parties. The record reflects that the parties agreed TELRIC rates would apply to the tandem switching and common transport components of the transit function. (Tr. 1104). However, the rate for the transiting function has always been a disputed issue in the arbitration. (Tr. 1104). While BellSouth previously listed the transport charge separately, its most recent offer to resolve the issue involved a composite rate that would cover tandem switching, common transport and the TIC. (Tr. 1104-05). It appears that BellSouth tried a new approach to resolve an existing dispute. It does not appear that the dispute, itself, is new, or that BellSouth is negating agreements previously reached by the parties.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 65.

Item 86B

How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?

Positions of the Parties

BellSouth

BellSouth's position is that Joint Petitioners should be required to produce a Letter of Authorization (LOA) verifying that the party had the right to review a customer service record within two weeks of the request. (BellSouth Brief, p. 51). Because customer service records contain customer proprietary network information, the parties have agreed not to access the records without an LOA from the customer. *Id.* The parties have further agreed that parties must use their best efforts to provide the appropriate LOA within seven (7) business days. *Id.* BellSouth proposes that if a request is not complied with by the end of the seven business days, that the requesting party will provide notice that ordering systems may be suspended in five (5) days. *Id.* at 52.

BellSouth argues that its proposal is reasonable, given the Joint Petitioners' admission that producing the LOA could take as short a period of time as two days. (BellSouth Brief, p. 52). In addition, because the Agreement requires parties to continue meeting their contractual obligations during the pendency of a dispute, there is not a legitimate concern that BellSouth would take corrective action before the dispute has been resolved. *Id.* at 53. BellSouth also criticizes the speculative nature of Joint Petitioners' concerns. *Id.*

BellSouth contends that it is providing Joint Petitioners with what they say they want in that matters are referred to the dispute resolution provisions in the General Terms and Conditions of the Agreement, pursuant to which "each Party shall continue to perform its obligations under this Agreement." (BellSouth Reply Brief, p. 39, citing GTC § 13.2.) BellSouth further states that the proposed suspension and termination rights are triggered only if a carrier disregards a request to produce an LOA or fails to dispute a notice that alleges non-compliance related to customer service records. *Id.*

Joint Petitioners

With regard to disputes over unauthorized access to customer service records, Joint Petitioners do not see any reason to depart from the dispute resolution methodology present in the agreement. Joint Petitioners maintain that BellSouth's proposal includes "debilitating and extremely disruptive sanctions." (Joint Petitioner Brief, p. 58). Joint Petitioners further criticize BellSouth's proposal for being one-sided and for allowing BellSouth too much discretion in the imposition of sanctions. *Id.* at 59. Joint Petitioners acknowledge, however, that BellSouth has modified its proposal to provide that disputes would be resolved by a neutral decision-maker. *Id.* at 60.

Joint Petitioners argue that its proposed language would not absolve them from unlawful conduct, but rather it would protect them and their customers from unwarranted shutdowns of service. (Joint Petitioner Reply Brief, p. 35).

Staff Recommendation

The Staff recommends that the Commission order the following language for this issue:

> Disputes over Alleged Noncompliance. In its written notice to the other Party (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions), the alleging Party will state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions) to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall not invoke any remedy specified in this paragraph and shall instead proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary

and Confidential Information Section in the General Terms and Conditions of this Agreement.

This language adopts Joint Petitioners' proposed language related to emailing notice to recipients designated in the General Terms and Conditions. This condition does not seem unduly burdensome, and has the potential to avoid delay. This language also adopts Joint Petitioners' proposed language related to not invoking any remedy specified in this paragraph if there is a dispute over the allegation, and instead, proceeding to the dispute resolution provisions in the Agreement. BellSouth has not explained why the dispute resolution procedures set forth in the General Terms and Conditions of the Agreement would not be sufficient to resolve disputes over alleged unauthorized access to customer service records.

The Staff recommends that the Commission strike Joint Petitioners' proposed language that would prohibit BellSouth from invoking any remedy unless its allegations pertain to systemic violations and unless notice is first given to the Commission. The language regarding "systemic" unauthorized access is ambiguous and destined to create disputes between the parties over the violations are systemic. Given the procedural protections afforded to Joint Petitioners under the Staff r ecommendation, notice to the Commission is unnecessary prior to BellSouth invoking any remedy under this section of the Agreement. If there is a dispute over the allegation, then under Staff's recommendation, BellSouth would have to proceed in accordance with the dispute resolution provisions in the Agreement.

Finally, Staff recommends that the Commission adopt BellSouth's proposed language that "the alleging Party will state that additional applications for service may be refused . . ." Because the ultimate action is still not a certainty, it is not necessary to state the alleging Party " . . . 'may' state . . ."

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 86(B).

Item 97

When should payment of charges for service be due?

Positions of the Parties

BellSouth

BellSouth asks the Commission to order that payment for services should be made on or before the Payment Due Date in immediately available funds. (BellSouth Brief, p. 56). Joint Petitioners are aware that the due date will always be by the next bill issuance date; therefore their monthly bills are predictable and the individual CLECs are in the best position to predict their monthly billings. *Id.* at 56-57. This assertion is supported by the stellar pay performance that NuVox has achieved over the past two years. *Id.* at 57.

Joint Petitioners' claim that BellSouth's payment terms would be considered "unacceptable in most commercial settings" is belied by the terms and conditions of their own tariffs. (BellSouth Brief, p. 57 citing to Joint Petitioner Direct Testimony at 106). Joint Petitioners impose conditions on their own customers that they are unwilling to accept from BellSouth. (BellSouth Brief, p. 57). Moreover, BellSouth's proposal is consistent with the terms and conditions that it offers to its own customers. *Id.*

BellSouth also challenges the Joint Petitioners' assertions that it takes about seven days or more for BellSouth to deliver bills to CLECs. BellSouth claims the SQM billing data demonstrates that CLECs receive bills within three to four days on average. (BellSouth Brief, p. 58). Besides, BellSouth points out, Joint Petitioners receive their bills electronically. *Id.* BellSouth also argues that it satisfies the nondiscrimination requirements in the Federal Act by delivering bills to CLECs in the same manner that it delivers bills to its own retail customers. (BellSouth Brief, p. 59). To accommodate Joint Petitioners' request, BellSouth would be forced to incur substantial costs due to changes to its billing systems. *Id.*

In an effort to resolve the issue, BellSouth has offered to allow a Joint Petitioner CLEC thirty days from the date that the CLEC notifies BellSouth that it did not receive its electronic bills within eight days of the bill date. (BellSouth Brief, p. 60). BellSouth disputed Joint Petitioners' claims that they receive incomplete or incomprehensible bills by noting that not one such bill was produced at the hearing. (BellSouth Reply Brief, p. 45). In responding to Joint Petitioners' discussion of the ITC^DeltaCom Communications, Inc. ("DeltaCom") arbitration, BellSouth states that Joint Petitioners rejected the payment and deposit terms that were agreed upon by BellSouth and DeltaCom. *Id.* at fn 33.

Joint Petitioners

Joint Petitioners advocate for a requirement that "[p]ayment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or thirty days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary." (Joint Petitioner Brief, p. 67). The practical reason for why Joint Petitioners need this amount of time to pay their bills is that the bills are voluminous and complex. *Id.* It takes Joint Petitioners more than three weeks to review and process the bills for payment. *Id.* NuVox claims that the average time it takes for BellSouth to deliver its bills is seven days. *Id.* In addition, the bills are often incomplete or incomprehensible. *Id.*

Joint Petitioners also claim that BellSouth's proposal violates its parity obligations because it does not abide by the payment due date that it seeks to impose on them. (Joint Petitioner Brief, p. 68). Joint Petitioners cite to the Commission's decision in Docket No. 16583-U[7] in which the Commission ordered BellSouth to allow ITC^DeltaCom to pay invoices 30 days "after the date of the bill is sent out by BellSouth." *Id.* at 69.

Joint Petitioners also explain their rejection of BellSouth's modified proposal regarding those instances in which electronic bills were not received within eight days of the invoice date. Under BellSouth's language to allow thirty days from a Joint Petitioners' notification of the late delivery of the electronic bill, any payment not received within 22 days would still be deemed "untimely." (Joint Petitioner Reply Brief, p. 37). Joint Petitioners urge the Commission to adopt either their proposal or the provision adopted as part of the DeltaCom arbitration. *Id.* at 38.

Staff Recommendation

The Staff recommends that the Commission adopt the same language that it approved for this issue in Docket No. 16583-U. In that arbitration, the Commission required bills would be due 30 days after the date the bill is sent out by BellSouth. Joint Petitioners provided credible testimony that it required a significant amount of time to review the vast number of bills that it receives from BellSouth. Regardless of whether BellSouth is delivering bills within three to four days on average or seven days on average, the logic employed by the Commission in Docket No. 16583-U still stands. That is, that the time it takes BellSouth to render a bill is out of the CLEC's control and should not infringe upon their time to review invoices. (DeltaCom Order, p. 15).

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 97.

Item 100

BellSouth Issue Statement: To avoid suspension or termination, should CLEC be required to pay additional amouuts that become past due after the Notice of Suspension or Termination for Nonpayment is sent?

CLEC Issue Statement: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

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[7] *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSoputh Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 16583-U.

Positions of the Parties

BellSouth

BellSouth's position is that "if a Joint Petitioner receives a notice of suspension or termination from BellSouth as a result of the Joint Petitioners' failure to timely pay amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action." (BellSouth Brief, p. 61). This position is grounded in three components of the parties' Agreement. First, BellSouth may suspend or terminate service for nonpayment. Att. 7 § 1.7.2. Second, this issue only concerns undisputed amounts that are past due. *Id.* Third, BellSouth will not suspend or disconnect service over amounts that are in dispute. *Id.*

In an effort to address Joint Petitioners' concern about the lack of certainty regarding the amount due, BellSouth revised its proposal to state that, upon request, BellSouth will advise of any additional amounts that have become due since the issuance of the original notice of suspension or termination. (BellSouth Brief, p. 62). BellSouth argues that its proposal is consistent with Commission Rule 515-12-1-.06(f), which requires that a customer shall be notified and allowed a reasonable time to pay a bill before service is discontinued. (BellSouth Reply Brief, p. 47).

Joint Petitioners

Joint Petitioners argue that BellSouth's right to suspend or terminate service should be contingent upon identifying for the CLEC the exact amount owed. (Joint Petitioner Brief, p. 69). Joint Petitioners emphasize the unfairness of BellSouth's proposal to terminate service if any account becomes past due by pointing out that BellSouth refused to agree to make this right reciprocal. *Id.*

Joint Petitioners object to BellSouth's proposal to include in the Notice for payment past due that service may be terminated unless payment is made of all amounts that either are overdue or may become past due on that and any other account. (Joint Petitioner Brief, p. 71). A CLEC would have a maximum of 15 days to "process, dispute, calculate, and pay" these amounts prior to BellSouth rejecting new service orders, and only 30 days to pay before BellSouth may terminate all services. *Id.* To further complicate matters, BellSouth will not state the full amount due on all accounts in the Notice that it provides to the CLEC. *Id.* Therefore, the CLEC will not know how much it must pay in order to avoid the actions discussed above. Joint Petitioners argue that BellSouth's proposal is contrary to the public interest, and therefore the Commission would have authority under 47 U.S.C. § 252(e)(2)(A)(ii) to strike the provision. *Id.* at 72.

Joint Petitioners do not accept BellSouth's offer to provide information of the additional amounts owed upon request because there would still be inadequate notice and increased potential for error and confusion. (Joint Petitioner Brief, p. 73).

Staff Recommendation

The Staff recommends that the Commission reject BellSouth's proposal to include in the Notice amounts that become due in the interim between the time the Notice is issued and the overdue amounts must be paid to avoid the rejection of new orders or suspension or termination of service. Joint Petitioners raised legitimate concerns that there would be ambiguity and lack of notice about the precise amount owed. Even though BellSouth agreed to provide the exact amount due on request, the amount would not be included in the initial notice. The burden would then be on the CLEC not just to pay any additional amounts that become due, but to ascertain what BellSouth's assertion is of these overdue amounts, verify that BellSouth's assertion is correct and then make payment. BellSouth's proposal does not afford CLECs adequate protection.

There was some discussion about whether BellSouth's proposal is consistent with the Commission Rule 515-12-1-.06(f). This rule requires that customers receive notification and allowed a reasonable time in which to make payment before service is discontinued. The rule does not delineate what must be included in the notification. The question then is whether it is a reasonable construction of the rule to state that notice must include the exact amount owed. The Staff recommends that the Commission find that for notice to comply with the Commission Rule it must identify the amount due.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 100.

Item 101

How many months of billing should be used to determine the maximum amount of the deposit?

Positions of the Parties

BellSouth

BellSouth proposes that deposits should not exceed an average of two months of actual billing for existing customers or two months of estimated billing for new customers. (BellSouth Brief, p. 62). BellSouth defends its proposal by stating that it must wait at least two months after service is rendered before disconnecting for nonpayment. *Id.* at 63. Experience demonstrates that BellSouth does not impose the maximum deposit requirement on the CLECs. *Id.* The Joint Petitioner proposal to impose a lower maximum deposit on existing customers than new customers does not account for the fact that some new CLECs will be in a stronger financial position. *Id.*

parties, and consider any future charges of bad faith at such time as a party raises such an issue before it.

If BellSouth seeks to impose a deposit that is within the amount permitted under the interconnection agreement, but is forced to reduce that deposit to account for an amount that it may not owe, then it is exposed to greater risk than is appropriate, based on the other provisions of the agreement.

Staff's recommendation to limit the offset to undisputed amounts is consistent with the treatment of other components in the interconnection agreement. Item 86B involved disputes over alleged unauthorized access to CSR information. Part of the supporting factual background for that item is that parties have to meet their obligations under the agreement during the pendency of a dispute. Item 100 involved the termination of service for nonpayment. Again, neither party disagreed with the premise that the notification for termination for nonpayment related only to undisputed amounts due. In Item 103, Joint Petitioners argue that service should not be terminated for failure to pay a deposit if the amount of the deposit is in dispute.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 102.

Item 103

Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Positions of the Parties

BellSouth

BellSouth's position is that it should be able to terminate service if a Joint Petitioner does not pay or properly dispute a deposit demand within thirty calendar days. (BellSouth Brief, p. 65). Termination for non-payment of a deposit makes sense given BellSouth's right to a deposit, and it is contemplated in Commission Rule 515-12-1-.06. *Id.*

BellSouth also points out that Joint Petitioners' end user tariffs authorize termination for non-payment. (BellSouth Reply Brief, p. 53).

Joint Petitioners

Joint Petitioners argue that BellSouth's ability to terminate service for non-payment of a deposit should be limited to those instances in which the Joint Petitioner does not dispute that the deposit is required or when such deposit has been ordered by the Commission. (Joint Petitioner Brief, p. 79). Any disputes over the appropriate deposit amount should be referred to the dispute resolution process set forth in the agreement. *Id.* at 80.

Staff Recommendation

The Staff recommends adoption of Joint Petitioners' proposed language. In BellSouth's brief, it argues that it would only terminate service for non-payment of a deposit if the Joint Petitioner did not "properly dispute" the deposit demand. However, the language BellSouth proposes as part of Section 1.8.6 does not recognize that qualification:

> Subject to Section 1.8.7 following, in the event ((customer_short_name)) fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days of ((customer_short_name))'s receipt of such request, service to ((customer_short_name)) may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to ((customer_short_name))'s account(s).

To the extent that BellSouth intended to exclude its right to terminate service for non-payment of deposit amounts that are in dispute, adoption of Joint Petitioners' language should not disadvantage BellSouth.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 103.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ATTACHMENT 6

NVX 00051-52
(NuVox Customer Contract)

Filed Under Seal

ATTACHMENT 7

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-989, SUB 3
DOCKET NO. P-824, SUB 6
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Joint Petition of NewSouth Communications	)	RECOMMENDED
Corp. et al. for Arbitration with BellSouth	)	ARBITRATION ORDER
Telecommunications, Inc.	)	

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on January 11 through 13, 2005

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

APPEARANCES:

For NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Management Co. Switched Services, LLC:

Garret R. Hargrave, John J. Heitmann, and Stephanie A. Joyce, Kelley, Drye & Warren LLP, 1200 19th Street N.W., Suite 500, Washington, DC 20036

Henry C. Campen, Jr., Parker, Poe, Adams & Bernstein, LLP, Wachovia Capitol Center, 150 Fayetteville Street Mall, Suite 1400, P.O. Box 389, Raleigh, North Carolina 27602-0389

For BellSouth Telecommunications, Inc.:

James Meza, III and Robert Culpepper, BellSouth Telecommunications, Inc., Suite 4300, BellSouth Center, 675 West Peachtree Street, N.E., Atlanta, Georgia 30375

Edward L. Rankin, III, 1521 BellSouth Plaza, 300 South Brevard Street, Charlotte, North Carolina 28202

CONCLUSIONS

The Commission concludes that the rights of end users should be defined pursuant to state contract law. The Commission further concludes that incidental, indirect, and consequential damages should be defined pursuant to state law. Therefore, the Commission believes BellSouth's proposed language for Section 10.4.4 should be adopted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 6 – MATRIX ITEM NO. 7: What should the indemnification obligations of the Parties be under this agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Party providing service under the Agreement should be indemnified, defended, and held harmless by the Party receiving services against any claim for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications. Additionally, customary provisions should be included to specify that the Party receiving services under the Agreement should be indemnified, defended, and held harmless by the Party providing services against any claims, loss, or damage to the extent reasonably arising from: (1) the providing Party's failure to abide by applicable law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence, or willful misconduct.

BELLSOUTH: Indemnification of the providing Party should be limited to two situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the Party's own communications; or (2) any claim, loss, or damages claims by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement." Thus, BellSouth's language is narrower and insures that the providing Party will be indemnified in the unique situation when the end user of the receiving Party sues the providing Party based on the receiving Party's use or reliance of services provided by the providing Party. BellSouth noted that in most cases the Joint Petitioners will be the receiving party and BellSouth will be the providing party.

PUBLIC STAFF: The Public Staff supported Joint Petitioners' proposed language.

DISCUSSION

While the parties agree that the receiving party should be indemnified for claims of libel, slander, or invasion of privacy, the Joint Petitioners contended that the providing party should undertake a heavier indemnity obligation, including reasonable and proximate losses to the extent it becomes liable due to the other party's negligence, gross negligence, willful misconduct, or failure to abide by applicable law. Their language would ensure that each party will be indemnified to a third-party in the case the other party's failure to comply with applicable law, regardless of whether the party is receiving or providing service. The Joint Petitioners objected to BellSouth's proposal because it provides that only the party providing services is indemnified under the Agreement.

BellSouth contended that the Joint Petitioners go too far in contending that the party receiving services should be indemnified, defended, and held harmless by the party providing services against claims, losses, and damages. BellSouth also contended that an interconnection agreement is not a commercial agreement but is rather governed by the Act and subsequent arbitration. Services provided pursuant to Section 251 are priced according to TELRIC principles and do not include open-ended indemnification of the party receiving services. TELRIC pricing does not account for the level of risk BellSouth is being asked to assume. If the Joint Petitioners would limit their liability to their customers through their tariffs or contracts, there would be no issue here.

The Public Staff concurred in the Joint Petitioners' position.

The Commission notes that in Finding of Fact No. 3 above, the Commission approved BellSouth's proposal for Section 10.4.2. This proposal allows the Joint Petitioners to limit their liability to customers through their tariffs or contracts and protects BellSouth if they do not. This limitation of liability provision appears to remove BellSouth's objection to the Joint Petitioners' proposal. Without that objection, there appears to be no issue.

CONCLUSIONS

The Commission concludes that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

<u>EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7</u>

<u>ISSUE NO. 7 – MATRIX ITEM NO. 9</u>:

<u>Joint Petitioners' Issue Statement</u>: Should a court of law be included among the venues at which a Party may seek dispute resolution under the Agreement?

<u>BellSouth's Issue Statement</u>: Should a party be allowed to take a dispute concerning the interpretation or implementation of any provision of the Agreement to a court of law for resolution without first exhausting administrative remedies?

POSITIONS OF PARTIES

JOINT PETITIONERS: Either party should be able to petition the Commission, the FCC, or a court of law for a resolution of a dispute. No legitimate dispute resolution should be foreclosed to the parties. The industry has experienced difficulties in achieving efficient regional dispute resolution. Moreover, there is an ongoing debate as to whether state commissions have the jurisdiction to enforce agreements and as to whether the FCC will engage in such enforcement. Courts of law have the jurisdiction to entertain such disputes. Indeed, in certain circumstances, they may be better equipped to adjudicate disputes and may provide a more efficient alternative to litigating before up to nine different state commissions or to waiting for the FCC to decide whether it will or will not accept an enforcement role given the particular facts.

BELLSOUTH: The Commission or the FCC should initially resolve disputes as to the appropriate interpretation and implementation of the Agreement. There can be no question that the Commission should resolve matters that are within its expertise and jurisdiction. State commissions are in the best position to resolve disputes relating to the interpretation or enforcement of agreements it approves. The Eleventh Circuit has recognized this, noting that the power to approve or reject interconnection agreements implies the power to interpret and enforce those agreements in the first instance. The Joint Petitioners actually conceded that the state commissions have the authority to enforce and interpret interconnection agreements but they seek the ability to go to a single forum, such as a court, to address region-wide disputes and avoid bifurcated hearings. But bifurcated hearings may be unavoidable if, under the doctrine of primary jurisdiction, a court would resolve matters outside of the expertise of the state commissions, while the nine state commissions would resolve matters within their expertise. BellSouth's language gives the Joint Petitioners the ability to resolve a dispute in a single forum—namely, the FCC.

PUBLIC STAFF: The Public Staff supported the Joint Petitioners' language.

DISCUSSION

The nub of this issue is whether the parties should be allowed to seek resolution of disputes regarding their Agreement in courts of law before first seeking resolution before the Commission. The Joint Petitioners noted that their present agreements have such a provision and argued that it is unclear that the Commission may issue an Order approving agreement language which deprives a court of jurisdiction, since the subject matter of state courts is set by the Legislature and that of the federal courts is set by Congress. BellSouth indicated that it would only permit disputes to be adjudicated in a court of law for matters lying outside the jurisdiction of the FCC or the Commission.

The Public Staff was cautious about whether the Commission had the authority to issue an order approving agreement language which would, over the objections of a party, deprive a court of its jurisdiction.

The Commission shares the concerns of the Joint Petitioners and the Public Staff on this issue. The subject matter of the North Carolina courts is set by the Legislature pursuant to N.C. Constitution Art. IV, Sec. 1 and of the federal courts by Congress pursuant to U.S. Constitution, Art. III, Sec. 1. It would thus appear questionable whether the Commission could approve an agreement depriving either set of courts of their jurisdiction to hear claims from parties seeking dispute resolution. Whether a court of law has jurisdiction over any particular claim is a matter to be adjudicated by the petitioned tribunal, and this need not be determined at this point.

CONCLUSIONS

The Commission concludes that the language proposed by the Joint Petitioners for Section 13 in the General Terms and Conditions of the Agreement should be adopted.

<u>EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8</u>

<u>ISSUE NO. 8 – MATRIX ITEM NO. 12</u>: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties?

POSITIONS OF PARTIES

JOINT PETITIONERS: Nothing in the Agreement should be construed to limit a party's rights or exempt a party from obligations under applicable law, as defined in the Agreement,[8] except in such cases where the parties have explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should be construed to be such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the parties in the past.

BELLSOUTH: BellSouth characterized the issue as being how the parties should handle disputes when one party asserts that an obligation, right, or other requirement arising from telecommunications law is applicable even if it is not expressly memorialized in the Agreement. The issue is not whether BellSouth intends to comply with applicable law; it has. The issue is about providing certainty in the Agreement as to the parties' obligations.

PUBLIC STAFF: The Public Staff supported Joint Petitioners' proposed language.

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[8] Section 32.1 defines "Applicable Law" as "all applicable federal, state, and local statutes, laws, rules regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to the obligations under this Agreement."

DISCUSSION

Essentially, the Joint Petitioners have argued that the Agreement should state that a party's rights and obligations under all relevant law existing at the time of the contract should apply unless explicitly limited or exempted. In this Agreement, the relevant state law would be Georgia law. The Joint Petitioners contended that an express provision that existing law applies unless expressly excluded or exempted would reduce disputes and litigation between the parties.

The text of the Joint Petitioners' proposal is as follows: "*Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable law or to abide by the provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.*"

BellSouth contended that the Joint Petitioners' position would create more uncertainty, and it believes that, if there is a disagreement over applicable law, after the dispute is resolved, the Agreement should be amended so that the new obligation applies only prospectively and not retroactively.

The text of BellSouth's proposal is as follows: "*This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this agreement by virtue of a reference to an FCC or Commission rule or order or, with respect to substantive Telecommunications law only, Applicable Law, and such obligation, right, or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right, or other requirement and any necessary rates, terms, and conditions, and the Party that failed to perform such obligation, right, or other requirement shall be held harmless from any liability for such failure until the obligation, right, or other requirement is expressly included in this Agreement by amendment thereto.*"

The Public Staff was supportive of the Joint Petitioners' language, believing that it would help to avoid controversies in the future. While it is unclear as to whether silence regarding the applicable law indicates that such law either does or does not apply, the Public Staff believes the Agreement should specifically address this matter to avoid potential litigation. The Public Staff further noted that BellSouth's proposed language allowing a party to seek Commission resolution if a disagreement arises over whether an applicable law, rule, or order applies to the Agreement and providing that the Commission's decision applies prospectively, does not resolve the question of silence in the Agreement. The Public Staff criticized the fairness of BellSouth's view of applying the law prospectively, since this would give an incentive to adopt an extreme or untenable interpretation of applicable law and then allow the party adopting that view to escape fiscal responsibility for the delay it caused by necessitating litigation before the Commission over its proper interpretation.

The Commission believes that the language proposed by the parties is in both cases problematical. The purpose of a contract is to memorialize the parties' mutual agreement at a particular point in time for the term of the contract, and the general purpose of the typical applicable law provision in a contract is to ensure that the parties do not break the law. Thus, the specific terms of the contract are to have primary significance. If there are particular laws that the parties wish to provide terms, but which they do not want to rewrite or negotiate, these specific laws should be incorporated by reference.

The principal defect of the Joint Petitioners' language is that it purports to import the entirety of "Applicable Law," except where the parties have agreed otherwise. Silence as to that law is, so to speak, no defense. This amounts to a "roving expedition" for a party to seek out other law, "no matter how discrete," to supply terms for the Agreement. The Commission believes this goes too far and is out of harmony with what a standard applicable law provision is supposed to do.

The principal defect of BellSouth's language is that it inserts a "prospectivity" clause which, as the Public Staff points out, gives an incentive to extreme positions and posturing. "Prospectivity" is also out of harmony with what a standard applicable law provision is supposed to do. In any case, should the Commission interpret the parties' intent and the meaning of certain contractual provisions, the law generally holds that the Commission's interpretation should be applicable during the entire term of the contract unless there was language directly to the contrary.

Nevertheless, the BellSouth language is more susceptible to reform. BellSouth is on firmer ground when it states that the "Agreement is intended to memorialize the Parties' mutual agreement" and provides that, "where something is not expressly memorialized but is nevertheless argued to be applicable, the matter should be referred to the Commission for resolution." This language should in large measure be retained up to the point of the phrase "resolution of the dispute," with some modifications for greater clarity, and the balance of the language, which deals with "prospectivity" should be deleted. References to courts of law and the FCC should be added to be consistent with the decision in the Evidence and Conclusions for Finding of Fact No. 7 above.

The Commission is doubtful that any language can be framed that anticipates all possible disputes given the volume of laws, legal principles, and possible fact situations involved. If both parties dislike the language suggested by the Commission, they are free to negotiate something which seems better to them.

CONCLUSIONS

The Commission concludes that the BellSouth language should be adopted as modified to read: *"This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right, or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute."*

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

ISSUE NO. 9 - MATRIX ITEM NO. 26: Should BellSouth be required to commingle UNEs or combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

POSITIONS OF PARTIES

JOINT PETITIONERS: Yes. BellSouth should be required to commingle UNEs or combinations with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

BELLSOUTH: BellSouth argued that this matter should be moved to the change of law docket for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum the Commission should defer resolution of this item until its decision in the change of law docket to avoid inconsistent rulings. Otherwise, BellSouth's view is that consistent with the FCC's *Errata* to the *TRO*, there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. This includes wholesale services obtained from any method, including those obtained as Section 271 elements.

DISCUSSION

The Commission notes that this issue involves whether BellSouth is required to commingle UNEs or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 14 - MATRIX ITEM NO. 65: Should BellSouth be allowed to charge the CLP a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

POSITIONS OF PARTIES

JOINT PETITIONERS: No. BellSouth should not be permitted to impose upon CLPs a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge that exploits BellSouth's market power and is discriminatory.

BELLSOUTH: Yes. BellSouth is not obligated to provide the transit function and the CLP has the right pursuant to the Act to request direct interconnection to other carriers. Additionally, BellSouth incurs costs beyond those for which the Commission ordered rates were designed to address, such as the costs of sending records to the CLPs identifying the originating carrier. BellSouth does not charge the CLP for these records and does not recover those costs in any other form. Moreover, this issue is not appropriate for arbitration in this proceeding because it involves a request by the CLPs that is not encompassed within BellSouth's obligations pursuant to Section 251 of the Act.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

DISCUSSION

The Joint Petitioners argued that the TIC is a non-TELRIC based additive charge enabling BellSouth to exploit its market power. The Joint Petitioners asserted that only BellSouth is in a position to provide transit service capable of connecting all carriers of all sizes, due to its past monopoly and continuing market dominance. The rate appears to be purely additive, simply enabling BellSouth to extract additional profits over and above the profit it already receives through the elemental UNE rates. In addition, the Joint Petitioners claimed that the TIC charge is discriminatory, since BellSouth does not impose this charge on all CLPs. Further, BellSouth threatened to double the rate if two of the Joint Petitioners did not agree to it during negotiations. The Joint Petitioners contended that BellSouth has not shown that its existing rates for the transiting function, tandem switching and common transport, do not adequately provide for recovery of its costs. The Joint Petitioners argued that BellSouth can seek to modify its TELRIC-based rates in the next generic pricing proceeding if its rates do not recover its costs. Despite BellSouth's contention that this issue should not be included in this arbitration, the Joint Petitioners argued that this issue is properly before the Commission because transiting is an interconnection issue and has been included in BellSouth's interconnection agreements for nearly eight years.

BellSouth initially contended that it was not required to provide a transit traffic function because it is not a Section 251 obligation under the Act. Therefore, BellSouth argued that if it provides the transit traffic function, the rates, terms, and conditions should be contained in a separately negotiated agreement. If BellSouth includes the transit traffic function in its Agreement, BellSouth believed that it should not be penalized by imposing rates for a service that, pursuant to a separate agreement, to which the Commission would not even be privy.

BellSouth maintained that it should be able charge a TIC for local transit and ISP-bound transit traffic because it is not obligated to provide the transit function to a CLP and the CLP has the ability to request direct interconnection to other carriers. BellSouth argued that the TIC is not "purely additive" because some costs are not recovered in tandem switching and common transport charges, such as the fee BellSouth pays to Telcordia for all messages sent and received through the Centralized Message Distribution System (CMDS). Moreover, BellSouth argued that because the TIC is not a Section 251 requirement, the rate should not be subject to the TELRIC cost standards set forth in Section 252.

In cross-examination, BellSouth witness Blake acknowledged that BellSouth has offered to provide a tandem transit function in these Agreements, but stated that the crux of the dispute in this case is the rate. Witness Blake also modified her position concerning BellSouth's Section 251 obligations by agreeing that BellSouth had an obligation to provide a tandem transit function based upon the FCC's Virginia arbitration orders and the Commission's September 22, 2003 Order in Docket No. P-19, Sub 454 that found ILECs have an obligation to provide transit service. Witness Blake testified that the TIC is designed to cover not only the cost of sending records identifying the originating carrier, but the "value-added" nature of the service as well. The transit function eliminates the need for originating carriers to directly connect with terminating carriers. The TELRIC tandem rate covers the transit part, while the TIC reflects the value of not having to directly interconnect with carriers.

The Public Staff stated in its Proposed Order that there appears to be no dispute that BellSouth is obligated to provide transit service. Witness Blake acknowledged that the Commission has previously found ILECs have an obligation to provide transit service and that the FCC has found the tandem transit function is a Section 251 obligation. Therefore, the Public Staff believed that the question before the Commission is whether BellSouth should be permitted to charge a TIC in addition to the TELRIC-based tandem switching rate. Although BellSouth has conceded that the tandem transit function is a Section 251 obligation, it is unclear why BellSouth still maintains that this function is not subject to the pricing requirements set forth in Section 252. The Public Staff noted that the FCC has implemented specific rules to which the Commission must adhere in determining the appropriate rates for providing a tandem transit function.

The Commission can find no basis for permitting BellSouth to impose a TIC for the tandem transit function. The tandem transit function is a Section 251 obligation, and

BellSouth must charge TELRIC rates for it. As pointed out by the Commission in its September 22, 2003 Order in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function. While this may not be necessary for the parties to this proceeding, the rates for providing a billing intermediary function are not required to be TELRIC-based. The Commission concurs that the tandem transit function provides some value to CLPs by permitting them to avoid directly interconnecting with all of the LECs subtending BellSouth's tandem. However, the fact that CLPs receive value for this service is not grounds for disregarding the FCC's pricing rules.

CONCLUSIONS

The Commission concludes that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 15 - MATRIX ITEM NO. 86(B): How should disputes over alleged unauthorized access to customer service record (CSR) information be handled under the Agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that if one party disputes the other party's assertion of noncompliance regarding access to CSR information, that party should notify the other party in writing of the basis for its assertion of compliance. The Joint Petitioners maintained that if the receiving party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or fails to provide the other party with proof sufficient to persuade the other party that it erred in asserting the noncompliance, the requesting party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the parties should cooperatively seek expedited resolution of the dispute. The Joint Petitioners asserted that "self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive; moreover, it effectively denies one party the ability to avail itself to the Dispute Resolution process otherwise agreed to by the parties.

BELLSOUTH: BellSouth maintained that the Commission should adopt BellSouth's most recent proposed language for Matrix Item No. 86(b) (if the accused party fails to produce an appropriate letter of authorization (LOA) within the allotted time period, the requesting party will provide written notice via email to a person designated by the other party to receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five days if such noncompliance does not cease) as it addresses all of the Joint Petitioners' concerns as well as gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSRs.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	)))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: On July 26, 2005, the Commission issued its *Recommended Arbitration Order* (*RAO*) in this docket. The Commission made the following:

FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability.

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners (including NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (Xspedius)) found in Section 10.5 of their Appendix A should be approved.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by the Joint Petitioners was unnecessary and potentially confusing. The Commission noted that end users are not parties to this Agreement or arbitration, and their rights should therefore be defined, not by the Agreement, but according to state contract law. As such, the Commission believed the Joint Petitioners' proposed language to be superfluous and indirect, incidental, and consequential damages should be defined by state law.

The Commission believes that its original decision on this issue was well-founded, and the arguments put forward by the Joint Petitioners to be not particularly compelling. Indeed, in a moment of comparative candor, the Joint Petitioners admitted that they had perhaps contributed to some of the confusion surrounding this issue. The Commission concurs but is not persuaded to adopt the Joint Petitioners' language.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Findings of Fact Nos. 4 and 5.

FINDING OF FACT NO. 6 (ISSUE NO. 6 – MATRIX ITEM NO. 7): What should the indemnification obligations of the Parties be under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of this issue. BellSouth argued that the Joint Petitioners' language requires BellSouth to indemnify the Joint Petitioners in virtually all circumstances while imposing essentially no indemnification obligations on the Joint Petitioners. The language the Joint Petitioners endorse imposes greater obligations than the Joint Petitioners have placed in their own tariffs where they are the providing parties. Such expansive language runs counter to the holding in the FCC's *Verizon Arbitration Order.* By contrast, the Commission rejected the Joint Petitioners' expansive view regarding the definition of applicable law. Since the standard here relates to applicable law, the Commission should take a similar narrow view on this issue. Moreover, even when read together with the Commission's ruling on Issue No. 3 (Matrix Item No. 5), the Joint Petitioners' language regarding indemnification is still at issue and objectionable. BellSouth's proposed language complies with industry standards and requires the receiving party to indemnify the providing party in only two limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving party's own communications; or (2) any claim, loss, or damage claimed by the "End User or customer of the party receiving services arising from such company's use or reliance on the providing party's services, actions, duties, or obligations arising under this Agreement."

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's Motion for Reconsideration concerning this issue should be denied. The Joint Petitioners argued that the language adopted by the Commission does not violate the *Virginia Arbitration Order* or any state commission order. The clause at issue here is not a blanket indemnity provision such as that in the *Virginia Arbitration Order* but one more narrowly focused. The Joint Petitioners also denied that the Commission's decision here conflicted with its decision elsewhere – it does not redefine Applicable Law but rather includes it as defined. Moreover, consistent with their own tariffs, the Joint Petitioners do not require the receiving party to indemnify the providing party for the providing party's negligence, nor is the language cast in such a way as to benefit only the Joint Petitioners.

PUBLIC STAFF: The Public Staff did not believe that BellSouth's objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth replied that the indemnification language adopted by the Commission is unique and is contrary to industry standards. BellSouth stated that the Kentucky PSC and the Florida PSC have already rejected such language in similar proceedings before them. In contrast to the *Virginia Arbitration Order*, the language adopted here is extremely broad and one-sided.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that the objections of BellSouth did not warrant reconsideration of the Commission's decision.

DISCUSSION

This issue concerns the indemnification obligations of the parties. In the *RAO,* the Commission adopted the language proposed by the Joint Petitioners as follows: "The Party providing services hereunder, its Affiliates, and its parent company, shall be indemnified, defended, and held harmless by the Party receiving services hereunder against any claim for libel, slander or invasion of privacy arising from the content of the receiving party's communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the Providing Party's negligence, gross negligence or willful misconduct."

BellSouth's principal argument is that this provision unfairly opens it to potentially extremely expansive liability. However, the Commission in its Discussion in the *RAO* on this issue noted that the Conclusion in this issue must be read together with the Commission's adoption of Finding of Fact No. 3. Finding of Fact No. 3 was decided favorably to BellSouth concerning limitations on liability. This decision, upheld in this Order, provides that if a party elects not to place standard industry limitations of liability in its contracts with end users or its tariffs, that party shall indemnify for any loss resulting from this decision. The Commission found that this provision "appears to remove BellSouth's objection to the Joint Petitioners' proposals. Without that objection, there appears to be no issue."

Of course, it should be anticipated that a party whose language was not adopted may continue to argue that its language should be adopted, but this does not change the fact that the adoption of BellSouth's language with reference to Finding of Fact No. 3 substantially mitigates the exposure that BellSouth might otherwise have with reference to the language adopted here. BellSouth has not offered any new, much less persuasive, arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this Finding of Fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 6.

<u>FINDING OF FACT NO. 8 (ISSUE NO. 8 – MATRIX ITEM NO. 12)</u>: Should the agreement explicitly state that all existing state and federal laws, rules, regulations and decisions apply unless otherwise specifically agreed to by the parties?

INITIAL COMMISSION DECISION

The Commission concluded that the BellSouth language should be adopted as modified to read: "This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute."

or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

5. That for Finding of Fact No. 15, the Commission finds it appropriate to deny BellSouth's Motion for Reconsideration, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as outlined hereinabove.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of February, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Robert V. Owens, Jr. dissents from the majority's decision on reconsideration on Finding of Fact No. 9.

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